

Honorable Ronald B. Leighton
Trial Date: November 28, 2011

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT TACOMA

STORMANS, INCORPORATED, et al.,

No. C07-5374 RBL

Plaintiffs,

vs.

MARY SELECKY, Secretary of the
Washington State Department of Health,
et al.,

Defendants,

and

JUDITH BILLINGS, et al.,

Intervenors.

PLAINTIFFS' PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW

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AND CONCLUSIONS OF LAW - i
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PLAINTIFFS' PROPOSED FINDINGS OF FACT
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(C07-5374)

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INTRODUCTION

The question in this case is whether the government can prohibit pharmacies from referring patients to a nearby pharmacy or other provider for reasons of conscience, while permitting pharmacies to refer patients for a wide variety of business, economic, and convenience reasons. The answer, under the Free Exercise and Due Process Clauses of the Constitution, is “no.”

As shown at trial, pharmacies refer patients every day for a wide variety of reasons. They do it when patients request a drug that falls outside their business niche; they do it when they choose not to order a drug because it is too expensive; they do it when a drug is temporarily out of stock for business reasons; they do it when carrying the drug may attract drug seekers or increase the risk of theft; and they do it when they don’t want to deal with a patient’s insurer or burdensome administrative requirements—among many other reasons. All of these referrals have been occurring for many years; all of them continue unabated under the State’s Regulations. But referrals for reasons of conscience are prohibited. That alone establishes that the Regulations are not generally applicable.

In response, the State argues that many of these common business referrals may be technically *illegal* under the Regulations. So, for example, pharmacies must stock drugs that fall outside their business niche; they must stock expensive drugs that will expire before they can be sold; they must stock OxyContin regardless of theft; and they must perform simple compounding, unit dosing, and any other services a patient requests, no matter how inconvenient or unprofitable. Obviously, this does not occur in practice. So when asked why the Board has never punished any of these widespread business practices, the State claims that the

1 Board is “complaint-driven.” That is, the Board must sit on its hands and ignore
2 these widespread “violations” of its rules until it receives a citizen complaint.

3 This argument is both meritless and implausible. As shown at trial, the
4 Board is not solely complaint-driven, but instead has numerous tools for promoting
5 compliance with its Regulations: It inspects pharmacies every two years; it
6 initiates its own complaints; it publishes regular newsletters flagging compliance
7 issues; and it works with the State Pharmacy Association to educate pharmacists.
8 But the Board has never used any of these tools to promote its supposedly strict
9 interpretation of the Regulations. Rather, internal Board correspondence, together
10 with the testimony at trial, demonstrates that the supposedly strict interpretation
11 of the Regulations is merely a post-hoc litigating position. In reality, the Board has
12 no interest in prohibiting widespread referrals for business and other non-
13 conscience reasons. Rather, the Regulations were designed to permit these
14 referrals precisely because they have long been an integral part of the practice of
15 pharmacy.

16 Even if the Board were complaint-driven, there are two problems with its
17 argument. First, even the strictest interpretation of the Regulations still leaves
18 pharmacies free to refer patients elsewhere for a wide variety of business reasons.
19 For example, it is undisputed that pharmacies can refer patients when they have
20 never had a request for a drug before; when they are temporarily out of stock for
21 business reasons; when they have made a business decision not to acquire
22 specialized equipment or expertise; or when they do not wish to deal with the
23 patient’s insurer. Beyond that, the Board has discretion to permit additional
24 referrals on a case-by-case basis in “substantially similar circumstances.” These
25 undisputed referrals threaten access just as much (or more than) referrals for
26

1 reasons of conscience; thus, even under a strict interpretation, the Regulations are
2 not generally applicable.

3 Second, even assuming the Board were complaint-driven, relying on citizen
4 complaints has resulted in selective enforcement. As shown at trial, Planned
5 Parenthood and other pro-choice groups have conducted an active campaign to
6 seek out pharmacies with religious objections to Plan B and to file complaints with
7 the Board. From 2006 to 2008, a single drug—Plan B—accounted for 46% of all
8 refusal complaints. By contrast, widespread business referrals rarely, if ever, give
9 rise to a complaint. Thus, the Board’s investigatory and enforcement efforts have
10 focused disproportionately on conscientious objections to Plan B.

11 Finally, the history of the Regulations confirms that they were intended to
12 target conscientious objections to Plan B. As shown at trial, the regulatory process
13 was initiated in response to conscientious objections to Plan B; the focus of the
14 process, from beginning to end, was on conscientious objections to Plan B; the
15 process was driven by powerful political opposition to conscientious objections to
16 Plan B; and the only result of the Regulations has been to prohibit conscientious
17 objections to Plan B. In short, it is impossible to examine the history of the
18 Regulations without concluding that they are primarily focused on stopping
19 conscientious objections to Plan B.

20 All of this controversy has taken a severe toll on the Plaintiffs. The owners
21 of Ralph’s Thriftway were not seeking out a political controversy; they did not even
22 know what Plan B was until they started receiving requests from pro-choice test
23 shoppers. But as soon as they mentioned a religious reason for not stocking Plan
24 B, they were flooded with picketing, boycotting, test shopping, and complaints.
25 They have now been told that they are operating in “outright defiance” of the
26 Regulations and are subject to the loss of their pharmacy license. Similarly, Ms.

1 Thelen was forced to leave a job that she loved due to the Regulations. And Ms.
2 Mesler has been told that she will be fired if the Regulations stand.

3 The saddest part of this controversy is how needless it is. People of many
4 different beliefs, or no beliefs, live in Washington. Conscience protections allow
5 people of diverse values to live peacefully in society with one another. The vast
6 majority of states have solved this societal conundrum by providing protections for
7 pharmacists, without incident. Here, Plaintiffs have agreed to refer patients to
8 dozens of nearby pharmacies that stock Plan B, yet the State has rejected this
9 compromise—even while conceding that conscientious objections to Plan B do not
10 impede timely access to medication. Plaintiffs do not seek to impose their beliefs.
11 All Plaintiffs ask is to be allowed to refer patients rather than be forced to take
12 what they believe to be innocent human life; the Constitution requires no less.

13 This Court conducted a bench trial of the above-captioned matter November
14 28-December 1, 2011, December 8-9, 2011, December 19-22, 2011, December 27,
15 2011, and January 18, 2012. Plaintiffs Stormans, Inc., Margo Thelen and Rhonda
16 Mesler are represented by their attorneys Kristen K. Waggoner, Steven T. O'Ban
17 and Katherine Anderson of Ellis, Li & McKinstry, PLLC and Luke Goodrich and
18 Eric Kniffin of the Becket Fund for Religious Liberty, *pro hac vice*, and Defendant
19 State officials are represented by Rene D. Tomisser and Joyce Roper of the Office
20 of Attorney General, and Defendants-Intervenors are represented by Thomas
21 Boeder, Andrew Greene and Katherine Bennett of Perkins Coie.

22 The Court received extensive testimonial and documentary evidence. The
23 vast majority of the testimonial evidence was provided by licensed pharmacists or
24 pharmacy owners including former and current Chairs of the Board, two former
25 Board Executive Directors and the current Board Executive Director, and a
26 veteran Board Inspector and long-serving Pharmacist Consultant, each of whom

1 have served in their respective positions for nearly 20 years, and the former
2 Executive Director of the Washington State Pharmacy Association.¹

3 After considering the evidence and the argument and authorities presented
4 by the parties' counsel, the Court makes the following findings of fact and
5 conclusions of law.

6 FINDINGS OF FACT

7 I. The Parties

8 1. Plaintiff Stormans, Inc. is a closed corporation, owned by Ken
9 Stormans who serves as President, and his three children, Kevin Stormans, Greg
10 Stormans, and Charelle Foege, who serve as Vice Presidents of the corporation.

11 2. Stormans, Inc. owns Bayview Thriftway and Ralph's Thriftway in
12 Olympia, Washington. Ralph's is a fourth-generation, family-operated grocery
13 store that includes a general retail pharmacy. Ralph's has had a pharmacy located
14 in the building since it began its operations in 1944.

15 3. Plaintiff Margo Thelen is a pharmacist licensed by the State of
16 Washington. Ms. Thelen currently works as a staff pharmacist at a hospital
17 pharmacy within Washington. Prior the Regulations becoming effective, she
18 worked as a staff pharmacist at Safeway. She has spent nearly all of her 40-year
19 career in retail pharmacy, both independent community and chain pharmacies.
20 She has never been employed by Ralph's.

21 4. Plaintiff Rhonda Mesler is a pharmacist licensed by the State of
22

23 ¹ The Court heard live testimony from former Board member and current Executive Director,
24 Susan Teil Boyer, and former Chair and current Board member Gary Harris. The Court reviewed
25 deposition testimony from former Board Chair Asaad Awan and Fed. R. 30(b)(6) deposition
26 testimony from the Board's current Chair, Al Linggi, and Boyer. The Court heard live testimony
27 from Steven Saxe, Lisa (Salmi) Hodgson, and Susan Teil Boyer, who served consecutively as the
Board's Executive Directors from 2004-present. Rod Shafer served as the Executive Director of the
Washington State Pharmacy Association for nearly 15 years until October 2008.

1 Washington. Ms. Mesler works as a pharmacy manager at a pharmacy within
2 Washington. She has been employed by her chain pharmacy for nearly eight years.
3 She has spent over 20 years working mainly at chain pharmacies in Washington.
4 She has never been employed by Ralph's.

5 5. Defendant Mary Selecky is the Secretary of the Washington State
6 Department of Health ("DOH"). Defendant Laurie Jenkins was an Assistant
7 Secretary responsible for the Washington Health Systems Quality Assurance,
8 which includes the Board of Pharmacy. The remaining defendants, George Roe,
9 Susan Teil Boyer, Dan Connolly, Gary Harris, Vandana Slatter, Rebecca Hille, and
10 Rosemarie Duffy, or their successors are members of the Washington Board of
11 Pharmacy ("Board").

12 6. All Board members, like the Secretary and Assistant Secretary of the
13 Department of Health, are appointed by the Governor. Five of the seven Board
14 members are licensed pharmacists and the two remaining members are public
15 members, not affiliated with any aspect of pharmacy. The term of appointment is
16 four years. A member can be appointed to a second term, but can serve no more
17 than two consecutive terms.

18 7. The Department of Health provides all staff to the Board of
19 Pharmacy. Staff assigned to the Board are employees of the Department of Health.

20 8. The Board of Pharmacy is responsible for the practice of pharmacy in
21 the state of Washington and to enforce all laws placed under its jurisdiction. The
22 Board also determines the qualifications for licensure and administers discipline
23 against the licenses held by licensees under procedures required in Wash. Rev.
24 Code §§ 18.64, 18.130, 34.05. Discipline for pharmacies and pharmacists may
25 include suspension and revocation of one's license.

26 9. Defendant-Intervenors Judith Billings, Rhiannon Andreini, Jeffrey
27

Schouten, Molly Harmon, Catherine Rosman, Emily Schmidt, and Tami Garrard (together “Intervenor-Defendants”) each claim to have an interest in this lawsuit. Two of the intervenors are HIV-positive and the remaining intervenors are women of child-bearing age who seek to ensure access to emergency contraception.

10. Plaintiffs’ religious beliefs prevent them from taking part in the destruction of innocent human life, and Plaintiffs believe that human life begins at the moment of fertilization. Plaintiffs have reviewed the labeling, FDA directives and other literature regarding the mechanism of action of Plan B and *ella* (“emergency contraceptives”) and believe that emergency contraceptives can prevent implantation of a fertilized ovum. Accordingly, Plaintiffs’ religious beliefs forbid them from dispensing these drugs.

11. When Plaintiffs receive requests for these drugs, they provide the customer with a “facilitated referral.” By stipulation, Plaintiffs and the State-Defendants have defined a facilitated referral as “referr[ing] the customer to a nearby provider and, upon the patient’s request, call[ing] the provider to ensure the product is in stock.”² None of Plaintiffs’ customers has ever been denied timely access to emergency contraception.

12. In 2007, the Board enacted a new regulation (WAC 246-869-010) and revised an existing regulation (WAC 246-863-095). Together with WAC 246-869-150(1) (collectively, the “Regulations”), these Regulations prohibit pharmacies from providing facilitated referrals if a pharmacy or pharmacist has a conscientious objection to delivering or dispensing that drug. Plaintiffs challenge the Regulations as a violation of the Free Exercise Clause, the Supremacy Clause, and the Due Process Clause of the U.S. Constitution.

II. Pharmacy Practice before the 2007 Regulations

² Plaintiffs’ Exhibit (“PX”) 348 (Stipulation, Dkt. 441), ¶ 1.2.

1 **A. Pharmacies’ discretion over stocking and referral.**

2 13. The business of pharmacy is complex. There are over 6,000 FDA-
3 approved drugs, and no pharmacy stocks them all. Thus, every pharmacy must
4 make decisions about which drugs to stock.

5 14. Pharmacies also face significant financial and competitive pressures.
6 In recent years, pharmacies have faced higher operational costs, decreasing
7 reimbursement rates, and more aggressive auditing from the insurance sector.³
8 For many drugs, pharmacies receive minimal net profits and dispensing fees.⁴
9 Often, pharmacies must order more of a drug than what the patient requires. And
10 they also receive “numerous high cost yet low volume prescriptions.”⁵

11 15. As a result of these pressures, pharmacies work to balance inventory
12 expense against patient demand. Many pharmacies emphasize inventory control,
13 imposing inventory benchmarks and urging pharmacists to turn over their
14 inventory on a monthly basis.

15 16. The impact of inventory costs on pharmacies varies depending on the
16 size of the pharmacy, whether it is an independent or chain pharmacy, the
17 clientele it has chosen to serve, and other factors. As the State’s attorney explained
18 in an email, pharmacies cannot carry “all medications needed by their community
19 or patient population....”⁶ Thus, more and more pharmacies have begun to limit
20 their inventory to certain medications and patient populations.⁷ And all
21 pharmacies must make choices about how to control variable costs, including labor
22 and inventory.

23 ³PX 297 (Memo from Al Linggi); Board’s Rule 30(b)(6) designee and Board Chair Al Linggi Dep., pp.
24 42-45; Trial Draft Transcript (“Tran.”), Shafer, Day 1, pp. 99-100, Day 10, pp. 131-136; Tran.
Harris, Day 10, p. 51.

25 ⁴ See e.g., Tran. Shafer, Day 1, pp. 98-99, 116.

26 ⁵ PX 297. See also n. 2.

27 ⁶ PX 343(email from Board’s attorney); Tran. Harris, Day 10, pp. 91-92.

⁷ Tran. Shafer, Day 1, pp. 151-52.

1 17. Pharmacies decide which drugs to stock based on a variety of factors.
2 These factors include, among other things, the niche market the pharmacy chooses
3 to serve, the expense of the drug, the shelf-life of the drug, the demand for the
4 drug, insurance reimbursement amounts and requirements, monitoring or
5 training required to dispense the drug, inventory carrying costs, contractual
6 limitations of wholesalers and buying groups, and the administrative resources
7 associated with the drug.

8 18. Board regulations have long given pharmacies broad discretion to
9 decide which drugs to stock. The primary regulation applicable to stocking
10 decisions is WAC 246-869-150(1). The Stocking Rule provides: “The pharmacy
11 must maintain at all times a representative assortment of drugs in order to meet
12 the pharmaceutical needs of its patients.” *Id.* Although the Stocking Rule has been
13 part of the Board’s regulations for over forty years, the Board has made no effort to
14 police compliance, and no pharmacy has ever been cited for violating it.

15 19. Board regulations have also long given pharmacies broad discretion
16 to decide which patients to serve and when to refer patients to a nearby pharmacy.
17 Because pharmacies stock only a fraction of all FDA-approved drugs, they receive
18 requests many times a day for a drug that is out of stock.⁸ When a pharmacy
19 receives a request for a drug that is out-of-stock, the standard practice is to do one
20 of three things: (1) obtain the drug for the customer (for example, by ordering it,
21 and asking the patient to return to pick it up later); (2) return the unfilled
22 prescription to the customer; or (3) refer the customer to another pharmacy that

23 ⁸ See e.g., Tran. Fuller, Day 4, pp. 33-34; Tran. Boyer, Day 5, 151, 170; Tran. Thelen, Day 6, p. 142-
24 46; Tran. Mesler, Day 6, pp. 177, 185-90, Day 7, p. 154; Tran. Harris, Day 10, p. 8, 91, Day 11, p.
25 50; Board Chair Asaad Awan Dep., 17:12-18:4, 58:18-59:4; Rule 30(b)(6) designee, Chair Linggi
26 Dep., 130:19-131:1. See also PX 315 (2010 Board minutes); PX 356 (Board transcript of 2010
27 meeting); State’s Exhibit A-27 (September 2010 public comment from WSPA); PX 348 (Stipulation
Dkt 441); PX 343 (email from Board’s attorney); PX 359 (letter from Board Chair); PX 380 (email
from Board Chair); PX 405 (letter from Board’s attorney); PX 322 (AAG statement).

1 will fill the patient's prescription.

2 20. Referring the customer to another pharmacy is a very common
3 method for dealing with an out-of-stock drug. Pharmacies refer patients to other
4 pharmacies at least several times a day because a drug is not in stock.⁹ The State
5 formally stipulated that referral is often the most effective means to meet the
6 patient's request when a pharmacy or pharmacist is unable or unwilling to provide
7 the requested medication or when the pharmacy is out of stock of medication.¹⁰

8 **B. Referrals for reasons of conscience.**

9 21. Before the 2007 Regulations, pharmacies in Washington were also
10 permitted to refer patients for reasons of conscience.¹¹

11 22. In 1995, when the Washington legislature enacted the Basic Health
12 Care Law, it also enacted statutory protections for the right of conscience. RCW
13 48.43.065(1)-(2)(a); *see also* RCW 70.47.160(1)-(2)(a). The law recognizes that
14 "every individual possesses a fundamental right to exercise their religious beliefs
15 and conscience," and provides that no health care entity, including pharmacies or
16 pharmacists, "may be required by law or contract in any circumstances to
17 participate in the provision of or payment for a specific service if they object to so
18 doing for reason of conscience or religion." *Id.*

19 23. Although portions of the Basic Health Care Law have been repealed,
20 the State Insurance Commissioner continues to take the position that all insurers
21 must accommodate health care providers, including pharmacists, who decline to
22 provide a medical service based on conscience. It has also recognized and approved
23 of referral as a fully protected mechanism to accommodate conscientious objectors,
24

25 ⁹ *Id.*

26 ¹⁰ PX 348 (Stipulation Dkt 441) ¶ 1.5.

27 ¹¹ *See e.g.*, PX 11 (email from Saxe); PX 24 (Board newsletter); PX 348.

1 including pharmacists who decline to dispense Plan B.¹² Prior to the rulemaking
2 process, Board staff advised pharmacists that the conscience statutes protected
3 pharmacists from having to violate their conscience.

4 24. Referrals for reasons of conscience are also permitted in the vast
5 majority of states. The right to engage in referral for reasons of conscience has
6 been endorsed by the Washington State Pharmacy Association (“WSPA). In 1998,
7 the American Pharmacists Association (APhA) adopted a policy expressly
8 recognizing “the individual pharmacist’s right to exercise conscientious refusal,”
9 and supporting increased access to medication “without compromising the
10 pharmacist’s right of conscientious refusal.”¹³ The APhA position endorses referral
11 when a pharmacist has a conscientious objection.

12 25. The APhA policy was proposed by Don Williams, then-Executive
13 Director of the Board in Washington, in response to Oregon’s Death With Dignity
14 Act in 1998.¹⁴ Board witnesses testified that they continue to support a
15 pharmacist’s right to not dispense lethal drugs in the context of physician-assisted
16 suicide.¹⁵

17 26. In 2005, the issue of conscience-based referrals for Plan B began
18 receiving increased media attention. National and state-level pro-choice groups
19 launched a concerted effort to press for legislation banning the practice and many
20 states considered various measures in response. Only a handful of states adopted
21 measures. In Illinois, for example, Governor Rod Blagojevich signed an emergency
22 rule in early 2005 that required pharmacists to dispense emergency contraceptives
23

24 ¹²Insurance Commissioner’s Rule 30(b)(6) designee, Elizabeth Berendt Dep., 21:11-25:6; 34:5-24;
25 37:11-38:2.

26 ¹³ PX 22 (WSPA Conscience Clause Committee Report with APhA policy).

27 ¹⁴ Tran. Shafer, Day 10, pp. 128-129.

¹⁵ See e.g., Tran. Shafer, Day 1, pp. 109-10; Tran. Saxe, Day 1, p. 186; Tran. Fuller, Day 4, pp. 17-
18; Tran. Boyer, Day 5, 186; Tran. Harris, Day 10, p. 59, Day 11, p. 48.

1 if their pharmacies stocked any form of contraception.¹⁶

2 27. To date, seven states (besides Washington) have adopted a law or
3 policy limiting conscience-based referrals to some degree or another. However, the
4 only state that has clearly gone as far as Washington in requiring pharmacies to
5 stock Plan B is Illinois. The vast majority of states (42) leave pharmacies
6 essentially complete discretion to decide which drugs to stock and when to refer
7 patients elsewhere. And the only state that has gone as far as Washington—
8 Illinois—had its regulations struck down in state court as unconstitutional. *See*
9 *Dkt. #510* at 11-12.

10 28. One of Defendant-Intervenors' witnesses, Alta Charo, testified that in
11 her opinion, states that have not expressly endorsed referral can be assumed to
12 prohibit it. That testimony is contrary to the position of the Board, which has
13 concluded that Washington law permitted referral until the Regulations were
14 adopted.¹⁷ Ms. Charo's opinion is also contradicted by the testimony of Rod Shafer,
15 who served as the Executive Director of the Washington State Pharmacy
16 Association ("WSPA") for 14 years. Mr. Shafer testified that referral for business
17 and conscience reasons has been the standard of practice nationwide, including in
18 states that do not have laws specifically endorsing or prohibiting referral.¹⁸

19 29. Ms. Charo's testimony is also contrary to the position of many
20 professional health care organizations, which endorse referral as an appropriate
21 alternative for pharmacists who assert conscientious objections. This includes the
22

23 ¹⁶ *See Morr-Fitz, Inc. v. Blagojevich*, 2011 WL 1338081, No. 2005-CH-000495 (Ill. Cir. Ct. 7th Jud.
24 Cir., April 5, 2011).

¹⁷ *See e.g.*, PX 348 (Stipulation Dkt. 441), ¶ 1.2.

¹⁸ Tran. Shafer Day 10, 129-131. Mr. Shafer served as the WSPA's Executive Director for nearly 15
25 years and regularly interacted with pharmacists in similar positions in other states. He left his
26 position in October 2008 and served as the director of the California Pharmacists Association. Mr.
27 Shafer remains licensed in Washington. He has also worked in pharmacy in Texas and Arizona in
recent years.

1 American Medical Association, American Society of Health-System Pharmacists,
2 National Community Pharmacists Association, the American Pharmacists
3 Association, and the Washington State Pharmacists Association.

4 30. Finally, Ms. Charo's assertion conflicts with the State's own research.
5 In 2010, the Board asked the National Association of Boards of Pharmacy to better
6 understand how other states had addressed this issue.¹⁹ Of the 14 states
7 responding to the question, 13 states responded that they permit pharmacies to
8 refer patients to another pharmacy due to a moral or ethical objection. Fifteen of
9 16 states responded that they do not even require pharmacies to give patients a
10 timely alternative when a drug is not available.

11 **III. The Development of the 2007 Washington Regulations**

12 **A. Planned Parenthood and the Governor seek a rule prohibiting** 13 **conscientious objections to Plan B.**

14
15 31. The events giving rise to Washington's Regulations began in 2005.
16 Shortly after Governor Blagojevich signed his emergency rule, Planned
17 Parenthood and Northwest Women's Law Center (collectively referred to as
18 "Planned Parenthood") contacted the Governor's Office concerning conscientious
19 objections to emergency contraception.²⁰ Christina Hulet, Governor Gregoire's
20 Senior Health Policy Advisor, began meeting with Planned Parenthood.²¹ Planned
21 Parenthood's representative, Elaine Rose, had worked closely with the Governor in
22 the Attorney General's Office for many years.²² Planned Parenthood sought to
23 enlist the Governor's help to prohibit conscientious referrals for Plan B.

24
25 ¹⁹ PX 460 (2010 survey for Board by National Association of Boards of Pharmacy).

26 ²⁰ Tran. Hulet Day 3, pp. 73-74.

27 ²¹ *Id.* See also PX 19, 473 (meeting notes).

²² Trans. Hulet, Day 3, p. 78.

1 32. Ms. Hulet and Planned Parenthood contacted Steven Saxe, the
2 Board's Executive Director, in the spring or summer of 2005. Planned Parenthood
3 informed Mr. Saxe that they were considering national or state legislation on a
4 "pharmacist's right to refuse to fill a prescription for moral/religious views."²³
5 Planned Parenthood wrote the Board in August 2005, urging the Board to formally
6 address the issue and prohibit referral.

7 **B. The Board supports the right of conscience.**

8 33. In response, Mr. Saxe and the Board expressed support for the right
9 of conscience. Mr. Saxe raised the issue of conscientious objections to Plan B with
10 the Board several times in 2005. He wanted to ensure that the Board approved of
11 the staff's response.²⁴ The first time Mr. Saxe addressed the Board was by email in
12 April 2005. He forwarded an article on Governor Blagojevich's order and an
13 editorial that urged pharmacists with objections to "find another line of work."²⁵
14 Mr. Saxe advised the Board that staff were telling pharmacists that they were
15 permitted to refer. No Board member disagreed with this approach.

16 34. In response to Planned Parenthood's letter, the Board formally
17 addressed the issue at its August 2005 meeting. The Board voted to continue to
18 recommend referral when callers inquired about conscientious objections to Plan
19 B.²⁶ The Board publicly endorsed this message again in its October 2005
20 newsletter.²⁷

21 35. In January 2006, Planned Parenthood met personally with the
22 Governor, warning her that the WSPA would support conscience rights at the
23 Board's January 2006 meeting. The Governor then sent a letter to the Board

24 ²³ PX 13 (NWWLC email to Saxe). *See also* Tran. Saxe, Day 2, pp. 26-27.

25 ²⁴ Trans. Saxe, Day 2, pp. 33-34.

26 ²⁵ PX 6 (Saxe email).

27 ²⁶ PX 20 (Board minutes); Tran. Saxe, Day 2, pp. 33-34. *See also* PX 18 (Saxe's memo to Board).

²⁷ PX 24 (newsletter).

1 opposing referral for personal or conscientious reasons. She also appointed a new
2 member to the Board—Rosemary Duffy, who was a former Planned Parenthood
3 board member whom Planned Parenthood had recommended.

4 36. As expected, at the January 2006 Board meeting, the WSPA
5 recommended that pharmacists retain the right to refer patients elsewhere for
6 reasons of conscience. It identified unprofessional conduct as lecturing patients,
7 destroying prescriptions, and refusing to return prescriptions.²⁸ The Board voted
8 to open rulemaking to specifically address the conduct identified by the WSPA.
9 But no Board members expressed opposition to referrals for reasons of
10 conscience.²⁹

11
12 **C. The Governor considers how to circumvent the Board, and the**
13 **Human Rights Commission intervenes.**

14 37. In March 2006, Planned Parenthood provided a counter-presentation
15 to the Board. After the presentation, Ms. Hulet advised the Governor that there
16 was a strong possibility the Board would not adopt her “preferred policy.” She
17 explained that several board members believed pharmacists should have the same
18 right of conscientious objection as other providers.³⁰ The Governor then considered
19 terminating existing Board members or issuing an emergency rule or executive
20 order.³¹

21 38. Seeking to increase pressure on the Board, the Governor’s Office then
22 urged the Planned Parenthood to work together with the Human Rights
23 Commission (“HRC”). The HRC and Planned Parenthood met, and within days,

24 ²⁸ The Board was not aware of any incidents involving lecturing or destroying or refusing to return
25 prescriptions in Washington.

26 ²⁹ PX 37, pp. 5-7 (Board minutes). *See also* Tran. Shafer, Day 1, pp. 96-97, 133.

27 ³⁰ Tran. Hulet, Day 3, pp. 83-84. *See also* PX 53 (Governor’s briefing memo).

³¹ Tran. Hulet, Day 3, pp. 83-85; PX 55, p. 2 (Hulet notes, “#2-Emergency Rule”); PX 53.

1 the HRC Executive Director warned Mr. Saxe that the agency believed
2 conscientious objectors who referred patients were illegally discriminating against
3 women.³² The HRC Executive Director followed up with a letter threatening Board
4 members with personal liability if they passed a regulation permitting referral.³³
5 Planned Parenthood reviewed drafts and helped shape the message of this inter-
6 governmental warning, which was obviously intended to intimidate the Board.

7 **D. The Board holds public hearings.**

8 39. In April 2006, the Board held two public hearings. Testimony at the
9 hearings focused almost exclusively on conscientious objections to Plan B.

10 40. During the hearings, pro-choice participants repeated and discussed
11 four “refusal stories,” allegedly involving the denial of access to medication. These
12 stories involved (1) an abortion-related antibiotic at Swedish Medical Center; (2)
13 prenatal vitamins in Yakima; (3) syringes sought by a man with gelled hair and
14 tattoos, and (4) emergency contraception in Redmond. These stories originally
15 surfaced in a March 2006 letter from Planned Parenthood.³⁴ Nearly all of the
16 alleged refusal stories provided in the rulemaking process were presented at the
17 April 2006 hearings.³⁵

18 **E. The Board rejects the Governor’s Rule.**

19 41. After the April hearings, Board staff prepared a draft rule that
20 aligned with the Governor’s wishes. It prevented pharmacists from referring
21 patients to nearby providers if the drug was in stock and the patient could pay the
22

23 ³² Tran. Saxe, Day 2, p. 42; Tran. Baros-Friedt, Day 3, pp. 181-82, PX 492 (Friedt email to Planned
24 Parenthood); PX 499 (Friedt email to Governor’s office); PX 65 (Friedt email to Planned
25 Parenthood); PX 69 (Planned Parenthood email to Friedt). The HRC sent a second letter to the
26 Board in July 2006.

27 ³³ PX 70 (HRC April 2006 letter).

³⁴ PX 43 (Planned Parenthood letter).

³⁵ See e.g., Tran. Saxe, Day 2, 38-39, 46; Tran. Harris, Day 9, pp. 17-18.

1 pharmacy.³⁶ The Board also asked staff to draft an alternative rule that would
2 permit referral, including for reasons of conscience. The Board scheduled a vote on
3 the two drafts for June 1, 2006.³⁷

4 42. At the June 1 meeting, the Board rejected the Governor's favored
5 rule. Instead, it voted unanimously in favor of the draft that permitted referrals
6 for business, economic, convenience and conscientious reasons.³⁸

7 **F. The Governor threatens the Board and begins to re-write the rule.**
8

9 43. Governor Gregoire reacted swiftly and forcefully. Hours later, she
10 sent her third letter to the Board, "strongly oppos[ing] the draft pharmacist refusal
11 rules recommended by the Washington State Board of Pharmacy. . . ."³⁹
12 Representatives from the Governor's Office also met with Planned Parenthood to
13 discuss rewriting the rule.

14 44. Four days later, Governor Gregoire publicly explained that she could
15 remove the Board members when the Legislature returned if need be, but she did
16 not "want this to be done like we're in a dictatorship."⁴⁰ She also asked Planned
17 Parenthood to re-evaluate whether an emergency rule or executive order might
18 work.⁴¹ The media widely reported the Governor's threat. Board staff who had
19 worked for DOH for decades testified that this was the first instance in which a
20 Governor had ever threatened the Board, or any DOH agency board, with removal.

21
22 ³⁶ PX 82 (Governor's staff email about rule).

23 ³⁷ At the Board's request, staff provided the Board with more information on conscience issues as
24 well. PX 99 (Memo to Board).

25 ³⁸ See PX 102 (Board minutes).

26 ³⁹ Tran. Hulet, Day 3, pp. 93-94; PX 111 (notes rewriting rule); PX 104 (Hulet email with Governor
27 letter).

⁴⁰ Tran. Hulet, Day 3, pp. 98-100; PX 96 (transcript from press conference); PX 117 (news article).

⁴¹ Tran. Hulet, Day 3, pp. 95; PX 118 (Planned Parenthood and National Women's Law Center
memo on Blagojevich rule).

1 45. Local commentators, lawmakers and others roundly criticized the
2 Board in the media. Several Board members asked Board staff to develop a media
3 response to defend the Board's decision. But no response was ever developed.
4 Instead, DOH began to distance itself from the Board's position.⁴² DOH then
5 directed Mr. Saxe and Mr. Brian Peyton⁴³ to meet with Board Chair Asaad Awan
6 to urge him to move the Board to reconsider the June 1 rule.⁴⁴

7 46. Within a week of the vote, Planned Parenthood presented a new draft
8 rule to the Governor.⁴⁵ After reviewing that rule, the Governor asked Ms. Hulet
9 whether it was "clean enough for the advocates [*i.e.*, Planned Parenthood,
10 NWWLC and NARAL] re: conscious/moral issues."⁴⁶

11 47. Similarly, Mr. Saxe, who was intimately involved in the Governor's
12 drafting process explained the Governor's primary issue with the June 1 rule in an
13 email: "[T]he moral issue IS the basis of the concern."⁴⁷ "[T]he public, legislators
14 and governor are telling us loud and clear that they expect the rule to protect the
15 public from unwanted intervention based on the moral beliefs [*sic*] of a
16 pharmacist."⁴⁸

17 48. Mr. Saxe was also asked to compare the Governor's and WSPA's draft
18 rules in June 2006. He testified that the primary difference between the rules was
19 that the WSPA's rule permitted conscientious objections.⁴⁹ After reviewing the
20 Governor's rule, he offered the following suggestion on how to accomplish the
21 Governor's intent: "Would a statement that does not allow a pharmacist/pharmacy
22

23 ⁴² Tran. Saxe, Day 2, pp. 64-69; PX 132 (DOH email); PX 472 (DOH talking points).

24 ⁴³ Mr. Peyton works with DOH and the Governor's Office and directly reports to Secretary Selecky.

25 ⁴⁴ Tran. Saxe Day 2, pp. 62-63.

26 ⁴⁵ Tran. Hulet, Day 3, p. 100-101; PX 123 (Planned Parenthood email with draft).

27 ⁴⁶ Tran. Hulet, Day 2, pp. 104; PX 139 (Governor briefing memo).

⁴⁷ Tran. Saxe, Day 2, p. 169; PX 143 (Saxe email).

⁴⁸ PX 143; Tran. Saxe, Day 2, p. 70.

⁴⁹ Tran. Saxe, Day 2, p. 72.

1 the right to refuse for moral or religious judgment be clearer? This would leave
2 intact the ability to decline to dispense (provide alternatives) for most *legitimate*
3 examples raised; clinical, fraud, business, skill, etc.”⁵⁰ However, Saxe admitted
4 that it was difficult to draft language that would allow referrals for business
5 reasons, but not for reasons of conscience: “[T]he difficulty is trying to draft
6 language to allow facilitating a referral for *only these non-moral or non-religious*
7 *reasons*.”⁵¹ At trial, Mr. Saxe clarified that these “non-religious reasons” included
8 referral because of a drug’s expense, shelf-life, low demand, or a pharmacy’s
9 chosen business niche.⁵²

10 **G. The Governor convenes a task force.**

11 49. In order to forge a consensus in support of her rule, the Governor
12 convened a taskforce. She invited representatives from Planned Parenthood,
13 Northwest Women’s Law Center, the WSPA, Board member Donna Dockter, and
14 Don Downing, a University of Washington Pharmacy Professor. But she did not
15 invite any conscientious objectors, faith-based health care providers, or any other
16 outside organizations besides her “advocates,” which were the women’s
17 reproductive rights groups. Mr. Shafer represented the WSPA. Mr. Saxe attended
18 from the Board. And Ms. Hulet led the two meetings.

19 **H. The task force agrees to include business exemptions in the rule.**

20 50. The task force roughly divided into two camps. All three pharmacists
21 on the taskforce (not including the Board’s Executive Director Saxe) urged the
22 taskforce to revise the Governor’s rule to permit referral for both business and
23 conscience reasons.⁵³ By contrast, the Governor, Planned Parenthood, and the
24

25 ⁵⁰ PX 154, 155 (Saxe and Department of Health emails) (emphasis added).

26 ⁵¹ PX 157 (Saxe email) (emphasis added).

27 ⁵² Tran. Saxe, Day 1, pp. 72-77; PX 157.

⁵³ Tran. Hulet, Day 3, pp. 57-58.

1 other “advocates” insisted that referrals for reasons of conscience were off the
2 table.⁵⁴

3 51. The taskforce members discussed a variety of circumstances in which
4 pharmacies regularly refer patients due to the business, economic, practical, and
5 clinical realities of modern pharmacy practice. Mr. Shafer and Ms. Dockter
6 insisted that referral should continue to be permitted for the following reasons:

- 7 (1) the cost of the drug;
- 8 (2) low demand for the drug;
- 9 (3) limited shelf space;
- 10 (4) the need to order more of the drug than what the patient requested;
- 11 (5) an agreement prohibiting the purchase of certain brands of drugs or from
12 certain suppliers under formularies or contracts with buying groups and
13 wholesalers;
- 14 (6) a pharmacy’s decision that it would take too much time or effort to
15 register to sell the drug, monitor the patient, or prepare the prescription,
16 even though the prescription could be filled without any specialized
17 equipment or expertise;
- 18 (7) a pharmacy’s decision not to accept certain forms of payment, including
19 rejecting insurance altogether or rejecting specific insurance plans because
20 of low reimbursement rates or hassles with auditing or repayment;
- 21 (8) a niche pharmacy’s decision to limit its inventory to certain drugs or
22 patient populations;
- 23 (9) a pharmacy’s decision not to sell certain narcotics because of hassle, fear
24 or burglary or desire not to attract drug seekers;
- 25 (10) a pharmacy’s decision to offer some narcotics or syringes only by
26 prescription to avoid having to keep a registry or log;
- 27 (11) a pharmacy’s decision not to offer simple compounding; and

⁵⁴ Tran. Shafer, Day 1, p. 103.

1 (12) a pharmacy's decision not to offer unit-dosing or blister packing, which
2 doctors may require as a part of some prescriptions.⁵⁵

3 52. Ultimately, the members of the taskforce reached a compromise: Mr.
4 Shafer, for the WSPA, agreed to yield on the request to accommodate referrals for
5 reasons of conscience; the Governor, Planned Parenthood, and the advocates
6 agreed to permit referrals for business, economic, and convenience reasons.⁵⁶

7 53. Taskforce members also agreed to allow referral for conscientious
8 objections to lethal drugs under Washington's Death With Dignity Act, which had
9 not yet been enacted when the taskforce met.⁵⁷ They also confirmed that the Board
10 had not enforced the Stocking Rule, that it lacked a standard by which to do so,
11 and that the Regulations would not change stocking requirements.⁵⁸

12 54. To implement the compromise position—which would allow referral
13 for business and convenience reasons, but not for reasons of conscience—the
14 taskforce included a non-exhaustive list of exemptions from the rule, an exemption
15 for customary payment requirements, and a catch-all exemption for any
16 “substantially similar circumstances.”⁵⁹ The taskforce agreed that the open-ended
17 language in the rule provided ample flexibility to accommodate referrals for
18 business reasons.⁶⁰

19 55. Although the State suggested that the task force did not intend to
20 protect referrals for business reasons, the Court finds that the weight of the
21 evidence is to the contrary. Mr. Shafer provided uncontroverted testimony that the
22 taskforce drafted the Regulations to preserve referral for a variety of business,

23 ⁵⁵ Tran. Shafer, Day 1, pp. 100- 09, 153; Tran. Saxe, Day 3, pp. 31-32; Day 2, pp. 82-83; Tran.
24 Hulet, Day 3, p. 172.

25 ⁵⁶ Tran. Shafer, Day 1, p. 103

26 ⁵⁷ Tran. Shafer, Day 1, pp. 109-10; Tran. Saxe, Day 1, p. 186-87.

27 ⁵⁸ Tran. Shafer, Day 1, p. 115-116; Hulet, Day 3, pp. 61-63.

⁵⁹ See e.g., Tran. Shafer, Day 1, pp. 110-11; Tran. Hulet, Day 3, pp. 56-57, 62.

⁶⁰ *Id.*

1 economic, convenience, and clinical reasons, but not for reasons of conscience. Ms.
2 Hulet testified that she relied on Mr. Shafer and Ms. Dockter to identify the
3 necessary business exemptions and to explain how the pharmacy business worked.
4 Ms. Hulet also testified that Mr. Shafer was “key” to finalizing the exemptions.⁶¹
5 Ms. Hulet confirmed that the taskforce intended to capture the examples raised by
6 Mr. Shafer and Ms. Dockter at the taskforce. She also testified that Planned
7 Parenthood agreed to permit the WSPA’s business exemptions advocated by Mr.
8 Shafer in exchange for Mr. Shafer capitulating on the WSPA’s request for
9 conscience protection.⁶²

10 56. This account was confirmed by statements from the Board members
11 at the August and December 2006 meetings. At those meetings, Ms. Dockter
12 repeatedly raised business and convenience reasons for referral. In response, Mr.
13 Harris testified that he confirmed at the August Board meeting that he would not
14 discipline pharmacists for these reasons.⁶³ Mr. Harris also testified that the
15 Board’s counsel, Joyce Roper, advised the Board that it had the discretion to make
16 decisions on a case-by-case basis and would not impose discipline if they acted
17 consistently with current pharmacy practice.⁶⁴ Ms. Duffy made similar statements
18 at the Board’s meetings, specifically referring to the breadth of the non-exhaustive
19 “substantially similar” exemption language.⁶⁵ No Board member expressed
20 disagreement with Ms. Duffy or Ms. Roper (although Ms. Dockter urged greater
21 clarity in the Regulations). In short, abundant evidence supports a finding that the
22

23 ⁶¹ Tran. Hulet, Day 3, p. 49-51. *See also* Tran. Shafer, Day 1, p. 56-57.

24 ⁶² Tran. Hulet, Day 3, p. 62.

25 ⁶³ *See e.g.*, Tran. Harris, Day 10, pp. 48-59, 66-69; Tran. Shafer, Day 1, pp. 102-03; PX 99, Section 5
(Dockter examples); PX 532 (Dockter examples); PX 210 (August 2006 Board minutes); PX 232
(Dec. 2006 Board minutes).

26 ⁶⁴ *Id.*

27 ⁶⁵ *Id.*

1 Regulations were intended to permit referrals for business and convenience
2 reasons, but not for reasons of conscience.

3 **I. The Board approves the Governor's rule.**

4 57. The Governor's rule was set for a preliminary vote on August 31,
5 2006. Just days before the vote, the Governor personally called Board Chair Asaad
6 Awan. She told Awan that he was "to do [his] job" and to "do the right thing" and
7 that she was going to "roll up her sleeves and put on her boxing gloves."⁶⁶
8 According to Ms. Hulet, however, the Governor had previously instructed her not
9 to contact Board members because it would be illegal.⁶⁷ The Governor also sent a
10 fourth letter to the Board, urging approval of her rule.

11 58. Shortly before the preliminary vote, the FDA announced that Plan B
12 would be available in pharmacies over the counter for restricted distribution. At
13 the urging of Planned Parenthood, Ms. Hulet added a new clause—"to distribute
14 drugs and devices approved by the U.S. Food and Drug Administration for
15 restricted distribution by pharmacies"—specifically to ensure that pharmacies
16 would still be required to deliver Plan B under the rules.⁶⁸

17 59. At the August meeting, the Board approved the Governor's rule by a
18 preliminary vote of 4-2.

19 60. To guarantee final approval of the regulation in 2007, the Governor
20 took another unprecedented step: She involved her "advocates"—Planned
21 Parenthood, NWWLC and NARAL—in the process of interviewing candidates for
22 the Board. Board Chair Awan, who applied for a second term, testified that his
23 interview focused almost exclusively on the pharmacy refusal issue.⁶⁹ His
24

25 ⁶⁶ Board Chair Awan Dep., 72:6-73:3.

26 ⁶⁷ Tran. Hulet, Day 3, pp. 97-98.

27 ⁶⁸ Tran. Hulet, Day 3, pp. 109-110; PX 203 (Planned Parenthood email).

⁶⁹ Board Chair Awan Dep., 11:5-13:7, 14:20-24.

1 reappointment was opposed by the “advocates,” and the Governor declined to
2 reappoint him.

3 61. The Governor then selected two new candidates recommended by
4 Planned Parenthood, including Vandana Slatter, who was a NARAL Washington
5 board member.⁷⁰ The Senate committee chaired by Karen Keiser also scheduled a
6 Board member confirmation hearing for the day immediately following the Board’s
7 final vote on the Regulations.

8 62. Thus, on April 12, 2007, the Board voted to approve the final
9 Regulations. Three Board members were confirmed the next day.⁷¹ The
10 Regulations became effective in July 2007.

11
12 **J. The rulemaking process focused on conscientious objections to**
13 **Plan B.**

14 63. The State has argued that, throughout the rulemaking process, the
15 Board was not focused on conscientious objections to Plan B; instead, it was
16 focused on all medications and all forms of objection. In support, the State relies
17 on documents such as the Small Business Economic Impact Statement and
18 Concise Explanatory Statement, which were issued after the Board passed the
19 Regulations.

20 64. The Court finds that these documents are not inconsistent with the
21 Board’s focus on conscientious objections to Plan B, and that such a focus is
22 supported by the great weight of the evidence, including other documents issued
23 by the Board.

24 65. For example, the Board’s CR-101, memoranda, newsletters, and
25 emails were dominated by emergency contraception and conscientious objection to

26 ⁷⁰ Tran. Hulet, Day 3, p. 122; Tran. Saxe, Day 2, pp. 89.

27 ⁷¹ Tran. Hulet, Day 3, p. 121; PX 257 (Governor’s Monday alert).

1 Plan B. Board meetings and public testimony also focused almost entirely on
2 emergency contraception and conscientious objections.

3 66. The Board's primary undertaking to determine the impact of the
4 regulations on the practice of pharmacy was its survey in October 2006 of
5 Washington pharmacies.⁷² That survey focused exclusively on Plan B and
6 potential accommodations for conscientious objectors.

7 67. The formal guidance document on the Regulations, which the Board
8 provided directly to pharmacies and pharmacists, referred to Plan B and no other
9 drug. It also singled out only one reason for referral that was prohibited:
10 conscientious objection.⁷³

11 68. Similarly, Board witnesses testified that the object of the Regulations
12 was to specifically address conscientious objections.⁷⁴ In fact, Mr. Harris, who was
13 Vice-Chair in the 2006-07 rulemaking process and Chair in the 2010 process,
14 stated in writing to the Board that Plan B was not an abortifacient, that he would
15 be reluctant to discipline any pharmacy or pharmacist that made a good faith
16 effort to comply with the Stocking Rule, and that he would recommend prosecuting
17 all conscientious objectors who refused to fill prescriptions to the "full extent of the
18 law."⁷⁵

19 69. In sum, the Court finds that the weight of the evidence supports the
20 conclusion that the Board's regulatory focus was on requiring onsite delivery for
21 Plan B and forbidding referral for reason of conscience—not, as Defendants
22 contend, on access to all drugs and all non-clinical reasons for refusing to deliver
23 them.

24
25 ⁷² PX 432 (Survey).

26 ⁷³ PX 436 (Guidance letter)

27 ⁷⁴ See e.g., Tran. Harris, Day 11, p. 50; Tran. Fuller, Day 4, p. 62.

⁷⁵ PX 253 (Former Chair Harris letter to the Board)

1
2 **K. The 2010 rulemaking process confirmed that the Regulations**
3 **protect referrals for business reasons.**

4 70. The Board revisited the Delivery Rule in 2010. This case was initially
5 set for trial on July 28, 2010. Approximately a month before trial, and shortly after
6 their motion for summary judgment had been denied, the State informed Plaintiffs
7 that the Board of Pharmacy wanted to initiate a new rulemaking process and
8 adopt a rule that permitted referrals for all reasons, including referrals for reasons
9 of conscience.

10 71. The Board intended to develop a new rule because it was concerned
11 that the Regulations did not allow enough leeway for referrals. On June 29, 2010,
12 the Board unanimously voted to initiate rulemaking. The Board intended to
13 amend the Regulations to allow “all pharmacies and pharmacists” to engage in
14 facilitated referral for “any reason,” including when the pharmacy was “unwilling
15 to stock . . . or timely deliver or dispense lawfully prescribed medications . . . for
16 conscientious reasons.”⁷⁶ Six Board members attended the June 29 meeting, and a
17 majority of the Board Members voiced support for referral before the vote. No
18 Board member spoke against referral.⁷⁷

19 72. The State then asked Plaintiffs to join their motion to stay the July
20 28, 2010, trial. In order to secure Plaintiffs’ consent—and this Court’s approval—
21 Defendant State entered into a number of binding factual Stipulations regarding
22 the rulemaking process and facilitated referral:

- 23 1. The Board voted to commence the rule-making process to
24 amend the Rules to permit facilitated referral for “all
25 pharmacies and pharmacists” when a pharmacy or
pharmacist is unable or unwilling to stock or deliver a drug on

26 ⁷⁶ PX 348 (Dkt. #441, Stipulation), ¶ 1.4; *see also* PX 315 (BOP minutes).

27 ⁷⁷ PX 315 (Board minutes).

1 site for “any reason,” including “for conscientious reasons.”
(¶1.4)⁷⁸

- 2 2. Facilitated referral “is a time-honored practice.” (¶1.5)
- 3 3. Facilitated referral “continues to occur for many reasons.”
4 (¶1.5)
- 5 4. Facilitated referral “is often the most effective means to meet
6 the patient’s request when the pharmacy or pharmacist is
7 unable or unwilling to provide the requested medication or
8 when the pharmacy is out of stock of medication.” (¶1.5)
- 9 5. Facilitated referral “improve[s] the delivery of health care in
10 Washington, including when a drug is not cost-effective to
11 order, the drug requires monitoring or follow-up by the
12 pharmacist, and other reasons.” (¶1.5)
- 13 6. “[P]harmacies and pharmacists should retain the ability to
14 engage in facilitated referrals.” (¶1.5)
- 15 7. Facilitated referrals “are often in the best interest of
16 patients.” (¶1.5)
- 17 8. Facilitated referrals “do not pose a threat to timely access to
18 lawfully prescribed medications . . . includ[ing] Plan B.” (¶1.5)
- 19 9. Facilitated referrals “help assure timely access to lawfully
20 prescribed medications . . . includ[ing] Plan B.” (¶1.5)

21 73. The Stipulation was not a settlement of claims, but an agreement to
22 stay the trial to permit a change in the rule that the Board asserted would likely
23 accommodate Plaintiffs’ constitutional interests. Key State officials reviewed the
24 Stipulation prior to entry on July 12, 2010, including the Secretary of the
25 Department of Health (Mary Selecky), the Assistant Secretary (Karen Jensen),
26 and the current Executive Director of the Board of Pharmacy (Susan Teil Boyer).⁷⁹
27 Ms. Boyer confirmed that the representations in the Stipulations were accurate
and neither the Department of Health nor the Board attempted to revoke them at
any time.⁸⁰

⁷⁸ Numerical references are to the numbered sections of the Stipulation, Dkt. #441, PX 348.

⁷⁹ PX 347 (DOH timeline)

⁸⁰ Board’s 30(b)(6) designee, Susan Teil-Boyer, Dep. 22:13-27:22.

1 74. The announcement of the new rulemaking process provoked an
2 immediate outcry from Planned Parenthood and the Governor. Despite the fact
3 that there was no draft amendment or rule, the Governor quickly issued a
4 statement opposing facilitated referral.⁸¹ Although the Department of Health
5 initially supported facilitated referral, Secretary Mary Selecky sent the Board a
6 letter informing it that she “agree[d] with what [they] have heard from Governor
7 Gregoire’s office,” and that the “rule has served patient safety well in Washington
8 over the three years it’s been in place.”⁸²

9 75. At the Board’s November 2010 meeting, the Board discussed
10 facilitated referral. At that meeting, Chair Harris suggested that while today the
11 Board might be discussing objections to Plan B, the next issue could be religious
12 conservatives serving gays.⁸³ Chair Harris also testified that he understood the
13 only instance under the Regulations where a facilitated referral was not
14 permissible was for conscientious objections.⁸⁴ The Board then Board asked its
15 staff to research the meaning of the Stocking Rule and to confirm that pharmacies
16 need not stock expensive drugs; that the Regulations “recognize[] that a drug can
17 be out of stock even when a good faith effort at compliance is made”;⁸⁵ and that “a
18 representative assortment does not mean every drug needed by a pharmacist’s
19 patients.”⁸⁶ The Board’s Executive Director Boyer confirmed this in a PowerPoint
20 presentation, which she provided to the Board at its December 2010 meeting. The
21
22

23 ⁸¹ PX 329 (Governor’s statement).

24 ⁸² PX 389 (Selecky letter).

25 ⁸³ Tran. Harris, Day 10, 101.

26 ⁸⁴ Tran. Harris, Day 10, 99. Mr. Harris agreed that the Board was unaware of any personal non-
religious objections ever being asserted in either the 2006-07 or 2010 rulemaking processes.

27 ⁸⁵ PX 403 (AGO letter).

⁸⁶ *Id.*

1 PowerPoint was written with the Board's assistant attorney general and explains
2 that the Regulations have a carve-out for expensive "specialty" drugs.⁸⁷

3 76. After Chair Harris confirmed that he would "never" vote to allow
4 "religious as a valid reason for a facilitated referral," Executive Director asked Mr.
5 Harris to take a "more active and verbal role" at the December 2010 meeting.⁸⁸ At
6 that meeting, the Board voted 5-1-1 to end the rulemaking process with no
7 changes to the Regulations. The Board's Rule 30(b)(6) designee, Board Chair Al
8 Linggi, explained that there was no need to amend the rules because there was no
9 evidence of a lack of timely access to drugs, even though pharmacies routinely
10 receive requests for drugs that are out of stock and refer patients elsewhere.⁸⁹

11 77. Board witnesses confirmed that the testimony at the 2010
12 rulemaking process, just like the 2006-07 process, focused on two conscientious
13 objections to emergency contraception. During the 2010 rulemaking process, the
14 Board repeatedly confirmed that facilitated referrals for business reasons
15 continued to be commonplace even after the 2007 Regulations became effective.⁹⁰

16 **IV. Access to Medications Before and After the 2007 Regulations**

17 78. Several Board witnesses testified that the purpose of the Regulations
18 is to increase timely access to medication. However, the evidence at trial revealed
19 no problem of access to Plan B or any other drug before, during, or after the
20 rulemaking process.

23 ⁸⁷ PX 413 (Boyer PowerPoint); Tran. Harris, Day 10, pp. 106-07.

24 ⁸⁸ PX 402 (Boyer/Harris email)

25 ⁸⁹ Rule 30(b)(6) Board designee, Linggi Dep. 113:14-114:12; 115:2-16; 116:12-118:10; 118:20-110:1;
119:21-120:19; 124:10-124; 130:19-131:1; 137:19-138:19.

26 ⁹⁰ See e.g., PX 315 (2010 Board minutes); PX 356 (Board transcript of 2010 meeting); State's
27 Exhibit A-27 (September 2010 public comment from WSPA); PX 348 (2010 Stipulation); PX 343
(email from Board's attorney); PX 359 (letter from Board Chair) ; PX 380 (email from Board Chair);
PX 405 (letter from Board's attorney); PX 322 (AAG statement).

1 **A. Access to emergency contraception generally**

2 79. Washington has long been a leader in promoting access to emergency
3 contraception. It was the first state in the nation to permit pharmacists to
4 prescribe Plan B, and its pharmacy schools were the first in the nation to certify
5 students as emergency contraceptive providers.⁹¹ Due in part to these programs,
6 Washington has long had some of the highest sales of Plan B in the nation.

7 80. In 2006, Plan B became available to anyone over age sixteen without
8 a prescription. Since then, Plan B's sales have further increased. Currently, Plan
9 B can be purchased at pharmacies, doctors' offices, government health centers,
10 emergency rooms, Planned Parenthood, and a toll-free hotline. It is also available
11 via the Internet for overnight delivery.

12 81. Plan B is also widely available in Plaintiffs' communities. Prior to
13 trial, Ms. Mesler confirmed that within one mile of her pharmacy, Plan B is
14 available at four different pharmacies; within five miles, it is available at thirteen
15 pharmacies; and within twenty-five miles, it is available at eighteen pharmacies.⁹²
16 Similarly, Ms. Thelen confirmed that within one mile of her former job at Safeway,
17 Plan B is available at two pharmacies; within twenty miles, it is available at
18 twenty-eight pharmacies; and within twenty-five miles, it is available at sixty
19 pharmacies.⁹³ And within five miles of Ralph's Thriftway, there are over thirty
20 pharmacies that stock Plan B and four that stock *ella*.⁹⁴ Plaintiffs have regularly
21 referred patients to these nearby pharmacies, and there is no evidence that any of
22 Plaintiffs' customers have ever been unable to obtain timely access to emergency
23 contraceptives or any other drug.

24
25 ⁹¹ PX 41(Downing Email); PX 42 (Downing Memo); PX 138 (WSPA Fact Sheet).

26 ⁹² Tran. Mesler, Day 6, p. 178.

27 ⁹³ Tran. Thelen, Day 6, p. 127.

⁹⁴ Tran. Stormans, Day 5, p. 21.

1 **B. Survey Data on Access to Plan B**

2 82. The Board's survey data confirms that there has been no problem of
3 access to Plan B. In October 2006, after voting to approve the Regulations, the
4 Board commissioned a study of access to Plan B. That survey intentionally over-
5 sampled rural pharmacies to ensure that it would identify any access problems.⁹⁵
6 The total sample size was 540 pharmacies.⁹⁶

7 83. According to the survey, 77% of all Washington pharmacies stock
8 Plan B. Of the 23% that do not stock it, only 2% cited religious objections, while
9 21% cited low demand, an easy alternative source, or the pharmacy's status as a
10 hospital or niche pharmacy. Of the thirty-eight rural pharmacies, only six did not
11 stock Plan B. None of those six cited a religious reason.⁹⁷ Thus, the survey
12 confirms that Plan B is widely available, and religious objections do not pose a
13 barrier to access.

14 84. In 2006, the Washington State Pharmacy Association also studied
15 access to medication, with a particular focus on time-sensitive medications and
16 rural areas.⁹⁸ The WSPA's conclusion, which Mr. Shafer shared with Mr. Saxe, Ms.
17 Hulet, and the Board, was that there was no problem of access to any medication
18 in Washington.⁹⁹ The WSPA was also unaware of any instance where a patient
19 failed to receive medication in a timely manner due to a pharmacist's objection or
20 where a pharmacist confiscated or destroyed a prescription or lectured a patient.
21 Mr. Shafer also testified at trial that there was no problem of access to Plan B or
22 any other drug prior to the rulemaking process.¹⁰⁰ The Court finds Mr. Shafer's
23

24 ⁹⁵ PX. 432 (DOH Survey); Tran. Fuller, Day 4, p. 49.

25 ⁹⁶ Tran. Salmi, Day 8, p. 136.

26 ⁹⁷ PX. 219 (Fuller email); Tran. Fuller, Day 4, pp. 50-51.

27 ⁹⁸ Tran. Shafer, Day 1, p. 171

⁹⁹ Tran. Shafer, Day 1, pp. 144, 171.

¹⁰⁰ PX 432 (DOH Survey); Tran. Shafer, Day 1, p. 171.

1 testimony about access, as the head of the State Pharmacy Association, to be
2 credible.

3 85. In 2008 the WSPA conducted an online survey on access to emergency
4 contraceptives. As Mr. Shafer explained, the underlying responses and data
5 demonstrate that 86% of all pharmacies stock emergency contraceptives. Of the
6 14% that did not stock, only about 3% cited religious beliefs as the sole reason for
7 their decision.¹⁰¹ The data also revealed that 98.3% of pharmacists reported that
8 they either provide emergency contraception or have an established system to
9 facilitate the immediate needs of their patients. This further confirms that there
10 is no problem of access to Plan B.

11 **C. Board Testimony on Access to Plan B**

12 86. At trial, Board witnesses confirmed that there was no problem of
13 access to Plan B or any other drug, either before or after the rulemaking process.
14 Former Chair Harris, who served on the Board during both rulemaking processes,
15 explained that the Board has never identified a single drug that patients are
16 unable to access in Washington:

17
18 Q. Four years after the rule-making process began and you completed
19 that 2010 process, the board still was not able to identify a single drug
20 that was in Washington that was unable to be obtained due to access
21 issues, right?

22 A. As far as I know, we have no cases.¹⁰²

23 87. All three former Board Executive Directors, the Board's Pharmacist
24 Consultant and former and current Board members, similarly testified. For
25 example: pharmacy consultant Tim Fuller testified:

26 ¹⁰¹ Tran. Shafer, Day 10, p. 141.

27 ¹⁰² Tran. Harris, Day 10, pp. 105, 26 (mentioning DEA restrictions on amphetamines, but no
awareness of any other access problems).

1 Q. And you are not aware of any area in Washington, rural or nonrural for
2 which there is an access problem for time-sensitive drugs, correct?

3 A. Correct.¹⁰³

4 Mr. Saxe testified that he could not recall any complaints to the Board, about
5 access to medication in rural areas. And that the only information before the
6 Board on that issue was from the 2006 survey.¹⁰⁴ Ms. Salmi testified:

7 Q. At stakeholders meetings, you can't recall, can you, a single
8 community in the State that was identified as a location where one
9 couldn't get their HIV medication, can you?

10 A. No, but there was concerns about making sure that there's access to
11 medication.¹⁰⁵

12 ***

13 Q. [A]nd there's not a single area in the State that was identified
14 where there was an access problem at the stakeholders meetings to
15 Plan B, right?

16 A. No one came forth and said specifically this community. There was
17 general concern.¹⁰⁶

18 After her deposition was read into the record, Ms. Boyer also agreed that she was
19 not aware of any pharmacy refusing access to Plan B patients or of any other
20 access problem.¹⁰⁷

21 88. Similarly, after years of test shopping and litigation, Defendants have
22 not identified even one instance where a pharmacist refused to fill or referred a
23 patient because of a personal, non-conscientious objection.¹⁰⁸ Despite frequent
24 mentions of HIV during the rulemaking process, there is no evidence that any
25 patient has ever been denied HIV drugs due to a conscientious or "personal"
26 objection. Neither one of the two intervenors diagnosed with HIV/AIDS has ever
27

28 ¹⁰³ Tran. Fuller, Day 4, pp.46-47.

29 ¹⁰⁴ Tran. Saxe, Day 2, p. 29-30; PX 432 (DOH Survey).

30 ¹⁰⁵ Tran. Salmi, Day 8, p.90.

31 ¹⁰⁶ Tran. Salmi, Day 8, pp. 96-97.

32 ¹⁰⁷ Tran. Boyer, Day 6, pp. 21-22; *see also* PX 408 (Email from Board Member Connolly), pg. 4.

33 ¹⁰⁸ See e.g., Tran. Schouten, Day 4, p. 124; Tran. Billings, Day 7, p. 171-72, 174; Tran. Harmon, Day
34 8, pp. 4, 15; PX 527 (Andreini Declaration).

1 been denied medication, nor were they aware of anyone else denied HIV
2 medication due to a personal or conscientious objection.¹⁰⁹ Board witnesses
3 confirmed that no one testified in either the 2006-07 or 2010 rulemaking process to
4 being aware of any HIV denials or access issues.¹¹⁰

5 89. Finally, no Board witness, or any other witness, was able to identify
6 any particular community in Washington—rural or otherwise—that lacked timely
7 access to emergency contraceptives or any other time-sensitive medication.

8 90. In short, the weight of the testimony at trial strongly supports the
9 conclusion that there was no problem of access to Plan B or any other drug, either
10 before or after the rulemaking process.

11 **D. Refusal Stories**

12 91. In the absence of general, empirical, or systematic evidence of an
13 access problem, Defendants introduced evidence several anecdotal “refusal stories”
14 in support of the argument that there is an access problem. For example, during
15 the 2006-07 rulemaking process, the Governor specifically asked Planned
16 Parenthood to collect refusal stories.¹¹¹ In response, Planned Parenthood came up
17 with the Four Refusal Stories that were repeated throughout the 2006 rulemaking
18 process: abortion-related antibiotics at Swedish Medical Center, prenatal vitamins
19 in Yakima, syringes for a man with “gelled” hair and tattoos, and emergency
20 contraception in Redmond and a map repeating some of those stories and adding a
21 few new ones.¹¹² Similarly, during the 2010 rulemaking process, the State and
22 Intervenor sought to supplement the rulemaking record with additional refusal
23 stories. And at trial, Intervenor sought to introduce additional refusal stories that

24 ¹⁰⁹ Tran. Schouten, Day 4, p. 124; Tran. Billings, Day 7, p.174.

25 ¹¹⁰ *Id.*; Tran. Salmi, Day 8, pp. 94.

26 ¹¹¹ Tran. Hulet, Day 3, pp. 79-80.

27 ¹¹².PX. 43 (Planned Parenthood Letter); Ex. B-10 (Map). There was no evidence that the Board reviewed the map prepared by Planned Parenthood.

1 never arose during the rulemaking process.

2 92. After carefully considering the refusal stories in the rulemaking
3 record and at trial, the Court finds that those stories do not demonstrate a
4 problem of access to medication, for several reasons.

5 93. First, many of the refusal stories involved complaints that a drug was
6 not in stock, without any reference to conscientious or other objections.¹¹³ That
7 does not demonstrate an access problem. As noted above, pharmacies may be out
8 of stock for a wide variety of reasons, many of which are permissible under the
9 Regulations. In fact, the Board's survey found that pharmacies were more than ten
10 times more likely to not stock Plan B for business reasons than for reasons of
11 conscience.¹¹⁴

12 94. Second, many of the refusal stories did not involve refusals at all.
13 Rather, they involved complaints that a pharmacist said something a patient
14 found offensive;¹¹⁵ that a patient had to wait a short period of time before
15 obtaining a drug;¹¹⁶ or that the patient received the drug from a different
16 pharmacist who was on duty at the same time.¹¹⁷ Such incidents are generally
17 permissible under the Regulations.

18 ¹¹³ For example, Defendant-Intervenor Rhiannon Andreini testified that a pharmacist told her the
19 pharmacy "did not carry" Plan B. She also testified that the pharmacist did not tell her that he had
20 a religious objection to stocking Plan B and she could only speculate about the reason why he did
21 not carry the drug. Trans. Andreini, Day 9, p. 84. See also PX 527 (Andreini Declaration); Ex. B-41
(Celia Warren letter); Ex. B-39 (Jennifer Crow letter). Ms. Warren test shopped five pharmacies.
22 Two of the pharmacies were "out of stock". Ms. Crow tried to obtain emergency contraception at a
pharmacy and was told they did not stock it, with no reference to a conscientious or other objection
to the drug.

¹¹⁴ Ex. 432 (DOH Survey).

23 ¹¹⁵ For example, Ms. Harmon, an Intervenor and former Planned Parenthood volunteer, testified
24 that she was offended in 2003 when a pharmacist advised her that Plan B was not a form of birth
control. But Plan B's labeling specifically notifies patients that it is not a form of birth control. And
Ms. Harmon obtained Plan B without delay; Tran. Harmon, Day 8, pp. 12-13, 15, PX 424.

25 ¹¹⁶ For example, Dr. Kate McLean testified about an incident where one of her patients seeking
26 misoprostol was asked to wait until a pharmacist returned from lunch break, but declined to do so.
Tran. McLean Day 8, 178-82.

¹¹⁷ Tran. Harmon, Day 8, p. 15.

1 95. Third, several of the key refusal stories were investigated by the
2 Board and found to be inaccurately reported, unsubstantiated, or not a violation of
3 the rules. For example, the Board investigated the Swedish Medical Center
4 incident, which figured prominently in the 2006 rulemaking process, and found
5 that the pharmacist ultimately did dispense the drug, did not violate any rules,
6 and did not impose a barrier to access.¹¹⁸ Similarly, the Board investigated the
7 prenatal vitamins complaint, which also figured prominently in the rulemaking
8 process, and found that the patient had refused to pay for the product.¹¹⁹

9 96. Fourth, many of the refusal stories were uncorroborated or involved
10 mere hypotheticals. One of the most prominent stories involved an alleged denial
11 of syringes for a man with gelled hair and tattoos. But this incident was presented
12 in a letter to the Board as a hypothetical. It has never been corroborated, and no
13 patient has ever filed a complaint related to the denial of syringes.¹²⁰ (Pharmacies
14 also have no obligation to deliver a drug if they believe the prescription is
15 fraudulent, WAC 246-869-010(1)(d), and no obligation to deliver syringes if they
16 believe the syringe may be used for an unlawful purpose, RCW 70.115.050.)

17 97. Fifth, several of the refusal stories involved prescriptions for
18 misoprostol, which is commonly used in a medical abortion procedure. But
19 pharmacists have a right under state law not to participate in an abortion. RCW
20 9.02.150. Several witnesses testified about the delicate situations that can arise
21 when a patient is seeking misoprostol for an abortion or a miscarriage as the
22 recommended dosage is similar, and how inquiring into the patient's situation is
23 not advisable.¹²¹ Thus, when a pharmacist is presented with a prescription for

24 _____
¹¹⁸ PX 98 (DOH Investigation Report).

25 ¹¹⁹ PX. 217 (DOH letter).

26 ¹²⁰ Tran. Saxe, Day 2, p. 167. This example was also repeated in the HRC's letter. PX. 70 (HRC letter).

27 ¹²¹ Tran. McLean, Day 8, p. 176.

1 misoprostol, and it is unclear whether the prescription is for an abortion or not,
2 referring the patient elsewhere is preferable to having the pharmacist interrogate
3 the patient about what the prescription will be used for. Thus, these stories do not
4 demonstrate a problem of access.

5 98. Sixth, many of the refusal stories involved conduct that is permitted
6 under the Regulations. For example, in the story involving emergency
7 contraception in Redmond—the fourth of the prominent refusal stories during the
8 2006 rulemaking—the patient was seeking Plan B without a prescription.¹²² At
9 that time, Plan B was not available for sale without a prescription. Thus, the
10 pharmacy would have been violating the law if it had provided the drug. Instead,
11 it offered to refer the patient to a nearby pharmacy that could write a prescription
12 under a collaborative agreement, but the patient refused. Although Planned
13 Parenthood received this information three months before submitting this story to
14 the Board, it intentionally withheld the information and instead characterized the
15 incident as an example of a pharmacist refusal that posed a risk to patient
16 health.¹²³

17 99. That brings up another issue with the refusal stories: Many of those
18 stories appear to be distorted, exaggerated, or artificially manufactured in ways
19 that undermine their credibility. In the Redmond incident, for example, Planned
20 Parenthood withheld several key facts that would have given the Board a more
21 complete record, including the fact that the patient lacked a prescription.¹²⁴
22 Similarly, in the incident involving Dr. McLean, Planned Parenthood
23 characterized the conduct as a “denial” that required the patient to have
24

25 ¹²² PX 25 (Planned Parenthood letter to pharmacy), 28 (Letter from pharmacy to Planned
26 Parenthood).

27 ¹²³ PX. 43 (Planned Parenthood Letter).

¹²⁴ PX. 43; 25, 28.

1 surgery.¹²⁵ But in reality, the patient was merely asked to wait a few minutes, and
2 Dr. McLean did not tell the Board that the incident was the cause of surgery.
3 Thus, Dr. McLean acknowledged that Planned Parenthood's letter to the Board
4 was incomplete.¹²⁶

5 100. Similarly, many of the refusal stories were not the result of natural
6 encounters with access problems, but were instead manufactured by an active
7 campaign of test shopping. During the 2006-07 rulemaking process, Planned
8 Parenthood and other pro-choice activists published advertisements on their
9 websites and in fliers soliciting refusal stories; they solicited women to call
10 pharmacies to ask whether they stocked Plan B; and they sent women into
11 pharmacies to test whether the pharmacists would dispense Plan B. They also
12 developed forms to "document" the incidents including asking women to provide
13 their opinions on whether the pharmacist expressed "disapproval" when they
14 requested the drug.¹²⁷ Several pharmacists and owners confirmed the test
15 shopping said that they would receive a rash of calls or requests for Plan B within
16 a few days.¹²⁸ Both Ms. Thelen and Ms. Mesler were test-shopped by Planned
17 Parenthood.¹²⁹

18 101. Having closely examined the refusal stories, including those in the
19 rulemaking record and the testimony and documents submitted at trial, the Court
20 finds that the refusal stories do not demonstrate a problem of access. At best,
21 Defendants have offered a handful of anecdotes that do not cast meaningful light

22 ¹²⁵ Ex B-216 (Planned Parenthood letter).

23 ¹²⁶ Tran. McLean, Day 8, p. 178.

24 ¹²⁷ PX 448 (Cover My Pills Ad); PX 490 (Data Collection Form); PX 513 (Data Collection Form); PX
25 514 (Data Collection Form).

26 ¹²⁸ Tran. Stormans, Day 5, p. 17; Tran. Thelen, Day 6, p. 140; Tran. Shafer, Day 1, p. 125.

27 ¹²⁹ PX. 490, 514; Trans. Thelen, Day 6, p. 176. Trans. Blackman, Day 5, p. 118. Planned Parenthood
used the test shopping incident involving Ms. Thelen in a letter to the Board. Ex. B-21 (Planned
Parenthood letter) After hearing testimony from Ms. Thelen and Ms. Dana (Blackman) Gigler, I
find that Planned Parenthood's account to the Board was misleading.

1 on the issue of access—most of which involve conduct that is not prohibited by the
2 Regulations. At worst, the refusal stories show a concerted effort to manufacture
3 an alleged problem of access where there isn't one.

4 **IV. The Text of Washington's Regulations**

5 102. The relevant portions of the Regulations are codified at WAC 246-
6 869-010 (the "Delivery Rule") and WAC 246-869-150(1) (the "Stocking Rule").¹³⁰

7 The Delivery Rule provides, in pertinent part, as follows:

8 (1) Pharmacies have a duty to deliver lawfully prescribed drugs or
9 devices to patients and to distribute drugs and devices approved
10 by the U.S. Food and Drug Administration for restricted
11 distribution by pharmacies, or provide a therapeutically
equivalent drug or device in a timely manner consistent with
reasonable expectations for filling the prescription, except for the
following or substantially similar circumstances:

12 (a) Prescriptions containing an obvious or known error,
13 inadequacies in the instructions, known contraindications, or
incompatible prescriptions, or prescriptions requiring action in
14 accordance with WAC 246-875-040.

15 (b) National or state emergencies or guidelines affecting
availability, usage or supplies of drugs or devices;

16 (c) Lack of specialized equipment or expertise needed to safely
17 produce, store, or dispense drugs or devices, such as certain
drug compounding or storage for nuclear medicine;

18 (d) Potentially fraudulent prescriptions; or

19 (e) Unavailability of drug or device despite good faith compliance
20 with WAC 246-869-150.

21 (2) Nothing in this section requires pharmacies to deliver a drug or
22 device without payment of their usual and customary or
23 contracted charge.

24 ¹³⁰ Another portion of the Regulations is codified at WAC 246-863-095(4). This portion defines
25 "unprofessional conduct" to include destroying or refusing to return a lawful prescription, violating
26 a patient's privacy, discriminating against a patient, or intimidating or harassing a patient. WAC
27 246-863-095(4); *see also* WAC 246-869-010(4) (same). This provision, which was uncontroversial,
clarifies that pharmacists can be subjected to professional discipline for engaging in unprofessional
conduct. No party contends that it applies to Plaintiffs.

1 (3) If despite good faith compliance with WAC 246-869-150, the
2 lawfully prescribed drug or device is not in stock, or the
3 prescription cannot be filled pursuant to subsection (1)(a) of this
4 section, the pharmacy shall provide the patient or agent a timely
5 alternative for appropriate therapy which, consistent with
6 customary pharmacy practice, may include obtaining the drug or
7 device. These alternatives include but are not limited to:

8 (a) Contact the prescriber to address concerns such as those
9 identified in subsection (1)(a) of this section or to obtain
10 authorization to provide a therapeutically equivalent product;

11 (b) If requested by the patient or their agent, return unfilled
12 lawful prescriptions to the patient or agent; or

13 (c) If requested by the patient or their agent, communicate or
14 transmit, as permitted by law, the original prescription
15 information to a pharmacy of the patient's choice that will fill
16 the prescription in a timely manner.

17 WAC 246-869-010(1)-(3).

18 103. In general, the Delivery Rule imposes on pharmacies “a duty to
19 deliver lawfully prescribed drugs . . . in a timely manner.” WAC 246-869-010(1)
20 (emphasis added) (the “Delivery Rule”). This duty is then subject to several
21 exceptions. Five exceptions are enumerated in WAC 246-869-010(1)(a)-(e). A sixth
22 exception says that pharmacies need not dispense a drug “without payment of
23 their usual and customary or contracted charge.” WAC 246-869-010(1)(a)-(e). The
24 seventh exception is a catch-all provision applying to any circumstances that are
25 “substantially similar” to the first five exceptions. WAC 246-869-010(1). These
26 exceptions will be discussed in greater detail below.

27 104. A key exception is WAC 246-869-010(1)(e). It provides that a
pharmacy need not deliver a drug when it is “[u]navailab[le] . . . despite good faith
compliance with WAC 246-869-150 [*i.e.*, the Stocking Rule].” *Id.* In other words,
pharmacies need not deliver a drug when (a) the drug is “unavailable” (*i.e.*, out of
stock), and (b) the pharmacy is in “good faith compliance with [the Stocking Rule].”
Thus, the Delivery Rule must be read together with the Stocking Rule.

105. The Stocking Rule has been on the books for over forty years. It provides, in pertinent part: “The pharmacy must maintain at all times a representative assortment of drugs in order to meet the pharmaceutical needs of its patients.” WAC 246-869-150(1). The terms “representative assortment,” “pharmaceutical needs,” and “patients” have never been defined. Until the events giving rise to this litigation, the Board had never attempted to enforce the Stocking Rule against any pharmacy in over forty years.

V. The Operation of the Regulations

106. The Stocking Rule has now been in force for over forty years, and the Delivery Rule has been in force for over four years. Much of the evidence at trial focused on the effect of these rules in their actual operation. In general, the evidence showed that these Regulations have not restricted the stocking or referral practices of most pharmacies.

A. Stocking in Practice

107. Since the enactment of the Regulations, pharmacies have continued to exercise broad discretion over which drugs to stock. As several witnesses testified, pharmacies routinely decline to stock drugs for a wide variety of business, economic, and convenience reasons:

- Pharmacies decline to stock a drug when it falls outside the pharmacy’s business niche;¹³¹

¹³¹ Pharmacies specialize in HIV drugs, pediatric drugs, fertility drugs, diabetes drugs, mental health drugs, or long-term care drugs. So, for example, pediatric pharmacies typically do not stock drugs for the elderly; HIV pharmacies typically do not stock cancer drugs; and mental-health pharmacies typically do not stock fertility drugs. *See e.g.*, Tran. Saxe, Day 1, 75:19-20, 87:4-10, Shafer, Day 1, 152:18-153:14; Fuller, Day 4, 66:12-67:9; Stormans, Day 5, 101:18-102:6; Tiel-Boyer, Day 5, 186:13-22; PX 142, PX 157 (Saxe email); PX 403 (AAG Letter); PX 404 (Harris email).

- Pharmacies decline to stock drugs when they have insufficient demand;¹³²
- Pharmacies decline to stock drugs when they do not want to obtain the equipment or expertise necessary to dispense them;¹³³
- Pharmacies decline to stock drugs when they are forbidden to do so by contracts with their suppliers;¹³⁴
- Pharmacies decline to stock drugs when they are too expensive to be profitable;¹³⁵
- Pharmacies decline to stock drugs when they would have to order a larger quantity than the patient requires;¹³⁶
- Pharmacies decline to stock drugs when they have an inadequate shelf life given the pharmacy's demand;¹³⁷
- Pharmacies decline to stock drugs when they lack adequate shelf space;¹³⁸
- Pharmacies decline to stock certain expensive "specialty drugs" for complex conditions;¹³⁹
- Pharmacies decline to stock some drugs unless the patient calls to request the drug in advance;¹⁴⁰

¹³² See e.g., Board Chair Awan Dep. 17:16-20; Board's 30(b)(6) designee, Chair Linggi Dep. 18-19, 40, 55-56; Tran. Shafer, Day 1, 99:6-12, 100:24-101:1, 109:2-5; Saxe, Day 2, 163:2-10; Fuller, Day 4, pp. 51-5; Hodgson, Day 8, p. 133-34; Harris, Day 9, p. 40; PX 142, 157, 432; PX 157 (Saxe email).

¹³³ See e.g., Harris, Day 10, 41:4-25; Shafer, Day 1, 33:11-22; Saxe, Day 1, p. 81, Day 2, 113:4-21; PX 141 (Governor's memo); PX 142 (Saxe email).

¹³⁴ See e.g., Tran. Doll, Day 4, 185:9-24; Mesler, Day 6, 190:15-25; Harris, Day 10, 45; Shafer, Day 1; Tran. Mesler, Day 6, p. 189-190.

¹³⁵ See e.g., PX 297 (Linggi memo); Tran. Hulet, Day 3, 59:23-60:19; Fuller, Day 4, 15:9-12; Shafer, Day 1, 62:19-24; Boyer, Day 5, 196:13-197:8; Harris, Day 10, 40:11-18; PX 405 (AAG Letter to McDonald); PX 142 (Saxe email); PX 157 (Saxe email); PX 176 (Saxe email re Governor's concern); Tran. Thelen, Day 6, p. 145.

¹³⁶ See e.g., Shafer, Day 1, 101:16-25; Hulet Day 3, 141-42; Fuller, Day 4, 27:4-5; Doll, Day 4, 147, 204-05; Board's 30(b)(6) designee Boyer Dep. 18-19; Board's 30(b)(6) designee Salmi Dep. 98-100; PX 405 (AAG letter); Tran. Thelen, Day 6, p. 145.

¹³⁷ See e.g., Fuller, Day 4, 24:2-25:6; Saxe, Day 1, 61; Day 3, p. 31, 77; Mesler, Day 6, p. 185; Hulet, Day 3, p. 172; Harris, Day 8, p. 44; PX 397.

¹³⁸ See e.g., Fuller, Day 4, 31:13-19; Board Chair Awan Dep. 21-22; PX 343 (AAG email); Shafer, Day 1, p. 100; Harris, Day 9, p. 44, Day 10, 91; PX 157 (Saxe email).

¹³⁹ See e.g., PX 297 (Linggi memo); PX 142 (Saxe email); PX 413 (PowerPoint); Fuller, Day 4, 30:19-31:1; Harris, Day 7, p. 36; Day 10, p. 107; PX 356, p. 3 (Board meeting transcript).

¹⁴⁰ See e.g., PX 404 (Harris email).

- Pharmacy does not stock the drug because the pharmacist would have to monitor the patient or register with the drug company (e.g., Accutane, Clozapine/Clozaril);¹⁴¹
- Pharmacy does not stock Schedule V cough syrup or Schedule V pain-management drugs because of recordkeeping or clientele concerns;¹⁴²
- Pharmacy does not stock the drug because it would attract criminals (e.g., Oxycontin);¹⁴³
- Pharmacy does not stock a drug because it is not on the pharmacy's formulary list;¹⁴⁴
- Pharmacy does not stock a drug because it is part of a larger chain, which concentrates all of that drug in one pharmacy in the region;¹⁴⁵
- Pharmacy does not stock a name-brand drug because most insurance plans pay only for the generic.¹⁴⁶

108. These stocking decisions were common both before and after enactment of the Regulations. Board witnesses agreed that many of these practices are well-known. But in over forty years, none of these stocking practices has ever been restricted by the Stocking Rule.

B. Referral in Practice

109. Since the enactment of the Regulations, pharmacies have also continued to exercise broad discretion over when to refer patients elsewhere. As the Board has stipulated: “[R]eferral is a time-honored pharmacy practice, it continues to occur for many reasons, and is often the most effective means to meet

¹⁴¹ See e.g., Harris, Day 10, 35:24-36:10, 54:12-55:7; PX 532 (Dockter memo); Tran. Mesler, Day 7, p. 156; Tran. Thelen, Day 6, p. 144.

¹⁴² See e.g., PX 532; Harris, Day 10, 55:8-25; Shafer, Day 1, 107:23-108:5, 105:18-106:5; PX Ex. 532 (Dockter memo) p.2.

¹⁴³ See e.g., Doll, Day 4, 172:17-25; Teil-Boyer, Day 5, 180:12-182:20; Saxe, Day 1, p. 82; PX 90 (Board Memo).

¹⁴⁴ See e.g., Tran. Saxe, Day 1, 87:20-88:20; Tran. Mesler, Day 6, p. 189; Tran. Shafer, Day 1, p. 102, Day 10-, p. 158; Tran. Harris, Day 7, p. 116-117, Day, p. 45; Ex. B-44 (Shafer letter to Governor).

¹⁴⁵ See e.g., Harris, Day 10, 41:4-25; PX 435 (SBEIS) p.6; Board 30(b)(6) designee, Linggi Dep. 19-20.

¹⁴⁶ See e.g., Shafer, Day 1, 102:5-20; Fuller, Day 4, 11:3-12.

1 the patient's request when the pharmacy or pharmacist is unable or unwilling to
2 provide the requested medication." Dkt. #441 ¶ 1.5.

3 110. Board witnesses confirmed this stipulation, testifying that referral is
4 a time-honored, routine, and vital means of securing access to medication. They
5 also testified that referral should typically be left to the discretion of the
6 pharmacist, and that referral continues to occur today for a wide variety of
7 reasons.¹⁴⁷

8 111. One of the most common reasons for referral is that a drug is out-of-
9 stock. This may occur when a pharmacy declines to stock a drug for one of the
10 reasons discussed above. But it also may occur when a pharmacy typically stocks a
11 drug but temporarily runs out—for example, because the pharmacy experiences an
12 unexpected spike in demand; a pharmacy is trying to reduce its inventory to
13 become more profitable; or a pharmacy simply makes a mistake and does not order
14 enough of the drug. In either case, as the Board has stipulated, referral "is often
15 the most effective means to meet the patient's request." Dkt. #441 ¶ 1.5.

16 112. Even when a pharmacy has a drug in stock, there are a wide variety
17 of business, economic, or convenience reasons why a pharmacy may refer patients
18 elsewhere. Examples include:

- 19
- 20 • Pharmacy does not deliver the drug because it is temporarily out of stock for
21 business reasons;¹⁴⁸
 - 22 • Pharmacy does not deliver the drug because it does not accept the patient's
23 insurance;¹⁴⁹

24 ¹⁴⁷ See e.g., Fuller, Day 4, 33:21-34:18, 65:4-7; PX 157 Teil-Boyer, Day 5, 151:13-20; PX 297 (Linggi
25 memo); Teil-Boyer, Day 6, 13:15-18, 28:5-8; Harris, Day 9, 39:5-24, Day 10 8:7-20, Day 10, 91:7-11,
92:1-3; Day 11, 50:10-12; PX 380.

26 ¹⁴⁸ See e.g., Saxe, Day 2, 22:5-10; Doll, Day 4, 142:6-144:13; Ex. 322 (AAG Statement).

27 ¹⁴⁹ See e.g., Saxe, Day 3, 20:8-21; Fuller, Day 4, 10:23-11:1; Hulet, Day 3, 158:13-16; PX 504, p. 8
(CES); PX 99 (Board Memo); Harris, Day 10, pp. 51, 53.

- Pharmacy does not deliver the drug because it does not accept Medicaid/Medicare;¹⁵⁰
- Pharmacy does not deliver Plan B because the patient is under 17 and the pharmacist on duty is not part of a Collaborative Agreement Program;¹⁵¹
- Pharmacy does not deliver the drug because the pharmacist believes the patient might be a drug abuser;¹⁵²
- Pharmacy does not deliver lethal drugs (assisted suicide) for reasons of conscience;¹⁵³
- Pharmacy does not deliver the drug because the pharmacist would have to perform simple compounding;¹⁵⁴
- Pharmacy does not deliver the drug because it declines to do unit dosing;¹⁵⁵
- Pharmacy does not deliver the drug over the counter because it requires extra recordkeeping (e.g., Sudafed);¹⁵⁶
- Pharmacy does not deliver syringes over the counter because of recordkeeping or clientele concerns;¹⁵⁷
- Pharmacy does not deliver the drug because the patient violates the store's dress code;¹⁵⁸
- Pharmacy does not deliver the drug because the patient is disruptive;¹⁵⁹
- Pharmacy does not deliver the drug because it believes the patient may be a shoplifter;¹⁶⁰

¹⁵⁰ See e.g., Saxe, Day 1, 185:5-186:18; Fuller, Day 4, 11:13-12:11; Tran. Shafer, Day 1, p. 102; Tran. Harris, Day 10, p. 52; Tran. Mesler, Day 6, p. 187.

¹⁵¹ See e.g., Fuller, Day 4, 37:6-19.

¹⁵² See e.g., Hulet, Day 3, 156:5-12; Saxe, Day 3, 28:13-25; WAC § 246-875-010(1)(d); Tran. Fuller, Day 4, p. 13-14.

¹⁵³ See e.g., Saxe, Day 1, 186:19-188:19; Fuller, Day 4, 17:22-19:4; Teil-Boyer, Day 6, 109-119.

¹⁵⁴ See e.g., Fuller, Day 4, 19:5-21:22; Harris, Day 10, 42:10-43:6; PX 532; PX 142 (Saxe email); Tran. Mesler, Day 6, p. 190; Tran. Stormans, Day 5, p. 14-15; Tran. Thelen, Day 6, p. 144.

¹⁵⁵ See e.g., Doll, Day 4, 181:15-183:4; Teil-Boyer, Day 5, 190:7-191:22; PX 90 (Board Memo); Tran. Mesler, Day 6, p. 190.

¹⁵⁶ See e.g., Fuller, Day 4, 17:3-21, 23:5-24:1.

¹⁵⁷ See e.g., Teil-Boyer, Day 5, 179:11-180:11, Day 6, 14:12-16; PX 532 (Donna Dockter memo) p.2.

¹⁵⁸ See e.g., Fuller, Day 4, 15:13-16:3; PX 90 (Board Memo).

¹⁵⁹ See e.g., Fuller, Day 4, 16:8-15; PX 90 (Board Memo).

¹⁶⁰ See e.g., Fuller, Day 4, 16:16-25; PX 532 p.2; PX 90 (Board Memo).

1 113. Referrals for these reasons have been common both before and after
2 enactment of the Regulations. Board witnesses agreed that many of these
3 practices are well-known. But in the four years since the Delivery Rule was
4 enacted, none has ever been the subject of enforcement.

5 **C. Conscientious Objection in Practice**

6 114. Thus far, the only conduct that has been actively investigated and
7 treated as a violation of the Regulations is Plaintiffs' conscientious objections to
8 Plan B. As explained in more detail below, Ralph's has been subject to multiple
9 complaints under the Stocking and Delivery Rules. The Board has actively
10 investigated those complaints, and has also initiated a complaint of its own, while
11 dropping analogous complaints against other pharmacies that were temporarily
12 out of stock for business reasons. Several complaints against Ralph's have been
13 stayed pending this litigation. The Board has never dismissed a complaint against
14 Ralph's because it found a Stocking or Delivery Rules violation.

15 115. At trial, State's counsel took the position that Ralph's is operating in
16 "outright defiance" of the Stocking Rule. Several Board witnesses agreed that
17 Ralph's is in violation of the rule and faces significant penalties, up to and
18 including the revocation of its license, if it continues to refuse to stock Plan B for
19 reasons of conscience.

20 **VI. The Interpretation of the Regulations**

21 116. While the practical effect of the Regulations is largely undisputed, the
22 interpretation of the Regulations is not. Witnesses offered conflicting testimony on
23 whether the Regulations are intended to prohibit some of the common stocking
24 and referral practices discussed above.

1 **A. Interpretation of the Delivery Rule**

2 117. Witnesses also offered conflicting testimony on the scope of the
3 Delivery Rule, and particularly the exceptions to that rule. The Delivery Rule
4 contains five enumerated exemptions, for the following circumstances: (a)
5 erroneous, inadequate, or contraindicated prescriptions; (b) national emergencies
6 affecting availability of a drug; (c) drugs requiring specialized equipment or
7 expertise; (d) potentially fraudulent prescriptions; and (e) drugs that are out of
8 stock. WAC § 246-869-010(1)(a)-(e). In addition to these five exemptions, there is
9 also a catch-all exemption for any “substantially similar circumstances.” WAC
10 § 246-869-010(1). And there is an exemption that says no pharmacy can be
11 required to deliver a drug without payment of its “usual and customary or
12 contracted charge.” WAC § 246-869-010(2).

13 118. As noted above, the Delivery Rule has been on the books for over four
14 years, and no pharmacy has ever been found to be in violation of it. Pharmacies
15 continue to decline to deliver drugs, and to refer patients elsewhere, for a wide
16 variety of business, economic, and convenience reasons. Nevertheless, at trial, the
17 State took the position that many common referral practices technically violate the
18 Delivery Rule.

19 119. Some Board witnesses, including Susan Boyer and Lisa Hodgson,¹⁶¹
20 took the position that the exemptions to the Delivery Rule apply only in very
21 narrow circumstances involving threats to patient safety. According to these
22 witnesses, the Delivery Rule includes no “business exemptions”; thus, it is
23 unlawful to refer patients elsewhere for simple compounds, for unit dosing, for
24 over-the-counter drugs involving extra recordkeeping, or for patients who violate
25 store policies.

26

¹⁶¹ Day 6:15-25; 30(b)(6)Board’s 30(b)(6) designee (Salmi) Hodgson Dep., pp 105-09, 116.

1 120. Other witnesses, including Steve Saxe, Christina Hulet and Rod
2 Shafer,¹⁶² testified that the exemptions in the Delivery Rule were specifically
3 designed not only to protect patient safety, but also to protect standard business
4 reasons for referring patients elsewhere. According to these witnesses, terms like
5 “specialized equipment or expertise,” “good faith compliance,” “usual and
6 customary [charge],” and “substantially similar circumstances” were included in
7 the Delivery Rule precisely to preserve flexibility for common business practices.

8 121. The Court finds the testimony that the Delivery Rule was designed to
9 protect common business practices to be more credible, for several reasons. First, it
10 is consistent with how the Delivery Rule has operated in the four years since it
11 was enacted. In the last four years, the Board has never publicly interpreted or
12 applied the Delivery Rule to prohibit these common business referrals. It has
13 never announced a narrow interpretation of the exemptions in any guidance
14 documents, internal correspondence or newsletters. And it has never attempted to
15 inform pharmacies that these common business referrals are now unlawful. To the
16 contrary, the Board’s public statements on the Delivery Rule, have indicated that
17 the rule’s primary, if not exclusive, effect is to prohibit conscientious objections to
18 dispensing a drug.

19 122. Second, internal Board correspondence strongly indicates that the
20 Delivery Rule was designed to protect referrals for business reasons.

21 a. Similarly, in December 2010 Ms. Boyer presented to the Board a
22 definition of specialized drugs for purposes of interpreting the exemption for
23 “specialized equipment or expertise.” ¹⁶³ According to her definition, the Delivery
24 Rule exempts “specialty medications” proscribed for complex or chronic medical
25

26 ¹⁶² Day 1, 72:24-73:4; Day 3, 51:1-52:12, 177:10-24;

27 ¹⁶³ PX 413

1 conditions, including “drugs that are injected or infused,” and “drugs that are
2 usually not available at retail pharmacies.” She concluded that such medications
3 are “Called out in the Pharmacy Responsibility Rule.”

4 b. Board Chair, Al Linggi, described these specialty drugs in greater
5 detail in 2009 memorandum to the Board. These, he said, were “examples where
6 directed referrals are most frequently utilized in the practice of pharmacy.”
7 Consistent with Ms. Boyer’s interpretation, Mr. Linggi’s examples included
8 injectable drugs (Lovenox) and other expensive drugs that Mr. Shafer testified are
9 not available in most pharmacies but do not require specialized training or
10 equipment, such as Humira, Norditopin, Ribavirin, and certain
11 immunosuppressants.¹⁶⁴

12 123. Third, this understanding is consistent with every witness’s account
13 of the stakeholder meetings that resulted in the Regulations. As Rod Shafer,
14 Christina Hulet, and Steve Saxe agreed, the stakeholder meetings included two
15 opposing camps: the State Pharmacy Association, which wanted to preserve
16 referrals for conscience reasons *and* business reasons; and Planned Parenthood
17 and the other advocates, which strongly opposed referrals for reasons of
18 conscience. The compromise solution was to prohibit referrals for reasons of
19 conscience, but to exempt referrals for business reasons.

20 124. Fourth, several Board witnesses testified at trial that the Delivery
21 Rule exemptions protected referrals for business reasons. For example:

22 a. Mr. Fuller testified that the “specialized expertise” exemption permits
23 a pharmacy to refer a patient when the pharmacist on duty is not
24 comfortable dispensing a simple compound, even though that is a
25

26 ¹⁶⁴ PX 297; Shafer, Day 10, 136:22-137:25.

1 skill that all pharmacists are required to learn in pharmacy school.¹⁶⁵

2 b. Board witnesses offered conflicting testimony on what level of
3 “equipment” or “expertise” qualified as “specialized equipment or
4 expertise” under WAC § 246-869-010(c). Some witnesses agreed that
5 the Board had discretion under this provision to permit referrals for
6 simple compounding, Tim Fuller and Susan Boyer, or for drugs
7 requiring monitoring (such as Accutane and Clozeril), Gary Harris.¹⁶⁶

8 125. Finally, this understanding of the Delivery Rule is consistent with
9 the text of the exemptions. To be sure, some of the exemptions are limited to
10 concerns about patient safety. But the exemption for drugs that are “unavailable
11 despite good faith compliance” with the Stocking Rule is not primarily about
12 patient safety; it is an accommodation of the business reality that pharmacies
13 frequently run out of drugs. And if additional exemptions are permitted in
14 “substantially similar circumstances,” it is reasonable to infer that the Board has
15 discretion to make exemptions for other business realities.

16 126. To the extent that the exemptions in the Delivery Rule could be
17 interpreted more strictly to prohibit some referrals for business reasons, State
18 witnesses Susan Boyer, Jim Doll and Christina Hulet consistently testified that
19 the exemptions would have to be interpreted on a case-by-case basis, depending on
20 the reasons for the relevant conduct. Questions that must be decided on a case-by-
21 case basis would include the definition of “specialized equipment or expertise,”
22 “good faith compliance,” “usual and customary or contracted charge,” and
23 “substantially similar circumstances.”¹⁶⁷

24 127. Even under a narrow interpretation of the exemptions, there were

25 ¹⁶⁵Day 4, 38:12-20, 20:22-21:4

26 ¹⁶⁶ Day 4, 19:5-8; Tiel-Boyer, Day 5, 172:5-173:11; Day 10, 35:24-36:10, 54:12-55:7

27 ¹⁶⁷ Day 8, 104:11-18, Day 4, 180:13-20; Day 3, 59:16-22

1 several common business referrals that all witnesses agreed were permissible
2 under the Delivery Rule. For example, there is no dispute that pharmacies are
3 permitted to refer patients elsewhere when a drug is temporarily out of stock for
4 business reasons;¹⁶⁸ when the pharmacy does not accept the patient's insurance;¹⁶⁹
5 when the pharmacy does not accept Medicaid or Medicare; when the pharmacist is
6 reasonably concerned (even incorrectly) that the prescription is fraudulent or the
7 patient is a drug seeker; or when the pharmacy has a conscientious objection to
8 participating in assisted suicide.

9 128. In sum, the Court finds that, both as a matter of the Board's
10 interpretation and in practice, the Delivery Rule was designed to preserve
11 pharmacies' flexibility to refer patients elsewhere for a wide variety of business,
12 economic, and convenience reasons.

13 **B. Complaint-Driven Enforcement**

14 129. When questioned about widespread referrals for business reasons,
15 several Board witnesses testified that the Board has never enforced the
16 Regulations against those referrals because the Board is "complaint-driven."¹⁷⁰
17 According to these witnesses, many common referrals are unlawful, but the Board
18 is unable to enforce the Regulations or otherwise promote compliance until it
19 receives a citizen complaint.¹⁷¹

20 130. The Court finds this testimony to be implausible and not credible. As
21 several witnesses testified, the Board is not limited to citizen complaints, but
22

23 ¹⁶⁸ This can occur for a wide variety of reasons.

24 ¹⁶⁹ Walgreens, for example, which is the largest pharmacy chain in the state, no longer accepts
25 payments from certain insurance plans. Thus, thousands of patients who rely on those insurance
26 plans are barred from accessing any drug from a Walgreens pharmacy. Board witnesses testified to
27 being aware of Walgreens' policy, and several confirmed that it is permissible under the
Regulations.

¹⁷⁰ Day 4, 74:18-23; Day 9, 8:1-3; see also Dkt. 522, p.5

¹⁷¹ Day 1, 83:1-7; Day 5, 177:13-22; Day 8, 146:19-24

1 instead has a wide variety of mechanisms available for promoting compliance.

2 131. For example, the Board inspects pharmacies every two years; it can
3 initiate its own complaints; it can send out its own test-shoppers when it
4 reasonably suspects violations; it publishes regular newsletters flagging important
5 compliance issues for pharmacies; and it works with the State Pharmacy
6 Association to raise compliance issues with individual pharmacists.¹⁷².

7 132. Responding to complaints is only a small fraction of how the Board
8 ensures compliance with its regulations. As Gary Harris testified, less than one
9 percent of pharmacies ever have a complaint filed against them, while every
10 pharmacy is subject to inspection every two years. As Jim Doll (791-92)
11 testified, the more common method of ensuring compliance is through inspection
12 and education.

13 133. When the Board inspects pharmacies, it routinely checks for
14 compliance with every subsection of WAC § 246-869-150 *except* the Stocking Rule.
15 That is, inspectors check for expired drugs under WAC § 246-869-150(2); they
16 check for contaminated drugs under WAC § 246-869-150(3); they check for proper
17 labeling under WAC § 246-869-150(4); they check for unapproved drugs under
18 WAC § 246-869-150(5); and they check for proper storage under WAC § 246-869-
19 150(6). But they do not check for a “representative assortment” of drugs under
20 WAC § 246-869-150(1).

21 134. Several witnesses testified that it would not be difficult to check for a
22 representative assortment of drugs. For example, Steve Saxe, James Doll, Gary
23 Harris, and Rhonda Mesler agreed that the Board could spot check compliance by
24 looking at a pharmacy’s sales records and checking which drugs were on the
25

26 ¹⁷² Day 7, 49:11-15; Day 8, 61:13-16, 98:13-15); Day 8, 98:23-99:22; Day 10, 15:13-16:23

shelf.¹⁷³ Saxe, Doll and Harris also agreed that the Board could require pharmacies to keep a log of patients who are referred elsewhere and compare that log with the drugs on the shelf.¹⁷⁴ This would allow inspectors to determine with precision whether a pharmacy was maintaining a representative assortment of requested drugs. Several Board witnesses also testified that the Board can enact regulations prophylactically; thus, it is well within the Board's authority to impose these requirements. But in practice, the Board has made no effort to promote compliance with a strict interpretation of the Stocking Rule.

135. In addition to inspections, the Board can initiate its own complaints. In fact, the Board initiated a complaint under the Stocking Rule against Ralph's.¹⁷⁵ But despite widely known refusals to stock drugs for business reasons, the Board has never initiated a complaint under the Stocking Rule against any other pharmacy in over forty years.

136. Finally, the Board publishes newsletters, and holds annual joint conferences with the WSPA throughout the state to inform licensees on compliance issues. But the evidence at trial demonstrated that in over forty years, the Board made no effort to use these channels to promote compliance with a strict version of the Stocking Rule.¹⁷⁶

137. The same is true of the Delivery Rule. The Board has made no effort to uncover referrals for business reasons in the inspection process; it has initiated no complaints involving referrals for business reasons; and it has published no newsletters addressing referrals for business reasons.¹⁷⁷

138. In sum, the Court finds that the Board need not wait for citizen

¹⁷³Day 2, 175:2-24; Day 3, 7:23-9:8; Day 4, 167:25-169:23; Day 10, 20:22-21:1 ;Day 6: 1197-98.

¹⁷⁴Day 3, 9:9-10:11; Day 4, 172:5-13; Day 10, 21:2-22.

¹⁷⁵ Day 1, 83:8-14; Day 4, 112:24-113:4; Day 8, 115:9-14.

¹⁷⁶ Day 10, 116:11-119:3.

¹⁷⁷ Day 10, 119:10-15.

1 complaints to promote compliance with its Regulations; rather, it has a variety of
2 tools available to promote compliance. But in the case of the Delivery Rule and the
3 Stocking Rule, the Board has made no effort to curtail widespread referrals for
4 business reasons.

5 139. To the extent that the Board relies on citizen complaints, the
6 evidence at trial demonstrated that the enforcement process is potentially subject
7 to manipulation. In the vast majority of cases, a referral for business reasons is
8 never going to generate a complaint. But as shown at trial, Planned Parenthood
9 and other pro-choice groups have conducted an active campaign to seek out
10 pharmacies and pharmacists with religious objections to Plan B and to file
11 complaints with the Board. This has resulted in a disproportionate number of
12 investigations directed at religious objections to Plan B.

13 140. For example, from 2006 to 2008, complaints involving Plan B
14 accounted for 46% of all refusal complaints filed with the Board. Ralph's alone
15 accounted for one-third of all complaints, making it over 700 times more likely to
16 be the subject of a complaint than the average pharmacy.¹⁷⁸ Complaints involving
17 Plan B were also investigated at a higher rate than complaints involving other
18 drugs. The result was disproportionate enforcement efforts focused on
19 conscientious objections to Plan B.

20 **C. Accommodations**

21 141. The Regulations have also prohibited many pharmacies from
22 accommodating their employee's conscientious objections to Plan B or *ella*. Before
23 enactment of the Regulations, pharmacies typically accommodated conscientious
24 objectors by allowing referral. But under the new Regulations, a pharmacy cannot
25 refer patients to other pharmacies for reasons of conscience. Thus, if a pharmacy

26 ¹⁷⁸ Day 8, 115:25-116:22, 119:10-120:7.

1 has only one pharmacist on duty—as do most Washington pharmacies—that
2 pharmacist must dispense the drug regardless of her conscientious objections to
3 doing so.

4 142. During the rulemaking process, the Board discussed only three
5 options for dealing with lone pharmacists who conscientiously object to Plan B:
6 (1) hiring a second pharmacist for each shift, (2) arranging for an on-call
7 pharmacist for each shift, or (3) firing the conscientious objector.

8 143. The evidence at trial revealed that the first two options are typically
9 unworkable. As Mr. Fuller explained, the cost of hiring a second pharmacist
10 (\$80,000 per year) and the cost of an on-call pharmacist are both unrealistic and
11 unaffordable options for most employers. Ms. Boyer also testified that an on-call
12 pharmacist would expect to be paid more than a regular employee, would expect to
13 be paid for a minimum of half a day, and would need several hours of lead time
14 before her shift. Thus, it would typically be faster to refer a patient elsewhere than
15 to wait for an on-call pharmacist to arrive. Similarly, during the trial, Mr. Harris
16 had to return several times to complete his testimony because of his work
17 schedule. When he was asked if his chain pharmacy in the Seattle-area could find
18 a floater or on-call pharmacist for the following day, he responded that his
19 employer could not locate an on-call pharmacist on such short notice.

20 144. In light of these difficulties, Mr. Fuller opined that firing the
21 conscientious objector was the most likely option for employers that have only one
22 pharmacist on shift at a time. The Court finds this testimony to be credible.¹⁷⁹

23 145. Some witnesses suggested that conscientious objectors might be
24 accommodated via telepharmacy. Mr. Fuller, the Board official designated by the
25

26 ¹⁷⁹ Day 4, pp. 40:13-42:14.

1 Board as the person most knowledgeable regarding telepharmacy,¹⁸⁰ testified that
2 telepharmacy involves a pharmacist at a remote location interacting with patients
3 via an audio and visual link.¹⁸¹ The remote pharmacist counsels the patient and
4 oversees the technician when dispensing prescription or behind the counter
5 medications such as Plan B.¹⁸²

6 146. But the evidence at trial demonstrated that telepharmacy is not a
7 viable accommodation, for several reasons. First, state law requires a pharmacist
8 to be responsible for all activity taking place within a pharmacy, which includes
9 supervising pharmacy personnel. Pharmacy technicians are prohibited from filling
10 a prescription unless and until a licensed pharmacist has visually verified it. RCW
11 18.64.250(2); RCW 18.64A.030(1). This is equally true for a behind-the-counter
12 sale of Plan B. Pharmacists must counsel all patients with a new prescription and
13 be available to respond to questions about refills and behind the counter drugs,
14 such as Plan B for patients over the age of 16. An audio link alone between the
15 pharmacist and the patient has not been approved by the Board and would not
16 satisfy the requirement that the pharmacist oversee pharmacy personnel.¹⁸³

17 147. Second, Mr. Fuller, testified that the Board has rejected applications
18 for telepharmacy when pharmacies are located nearby.¹⁸⁴ This is because the Board
19 regards in-person patient contact to provide better care to patients than
20 telepharmacy. Thus, it is unlikely that the Board would approve telepharmacy as
21 an accommodation for conscientious objectors when there are nearby pharmacies
22 that offer in-person contact with willing pharmacists—as is the case for each of
23

24 ¹⁸⁰ Day 4, 69:2-5.

25 ¹⁸¹ Day 4, 93:20-24.

26 ¹⁸² Day 4, 44:5-45:21.

27 ¹⁸³ Day 4, 105:19-106:11

¹⁸⁴ Day 4, 101:17-102:25.

1 Plaintiffs' pharmacies, and the vast majority of pharmacies in the state.¹⁸⁵

2 148. Thus, it is no surprise that no applicant has ever sought approval for
3 a telepharmacy arrangement to accommodate a conscientious objector. Nor has
4 any applicant sought approval to use telepharmacy when a pharmacist is ill or
5 otherwise unavailable on short notice. In short, given the uncertain cost and
6 approval process for telepharmacy, and the limited nature of its availability , for
7 an employer it is not a viable option to accommodate a conscientious objectors.
8 Mr. Fuller agreed conceding that if he were an employer with the only option of
9 hiring a conscientious objector and accommodating her by telepharmacy, he would
10 not hire the conscientious objector.¹⁸⁶

11 **VIII. The Effect of the 2007 Regulations on the Plaintiffs**

12 149. The evidence at trial demonstrated that the Regulations have had a
13 direct impact on Plaintiffs' livelihood and families. Plaintiffs are Christians who
14 believe that all of human life is uniquely and inherently precious because it is
15 created by God in His image. Plaintiffs believe that dispensing Plan B or *ella*
16 constitutes direct participation in the destruction of human life. Thus, their
17 religious beliefs prevent them from stocking or delivering Plan B or *ella*.

18 **A. Impact on the Stormans' family.**

19 150. Based on the Stormans' religious beliefs, Ralph's does not stock
20 emergency contraceptives. Ralph's has had multiple requests for Plan B and *ella*
21 from new and existing patients. When Ralph's receives requests for those drugs, it
22 informs customers of the nearby pharmacies where they can purchase the drug
23 and offers to call those pharmacies on the customer's behalf. There are over thirty
24 pharmacies within five miles of Ralph's that stock and dispense Plan B.

25
26 ¹⁸⁵ Day 4, 104:2-7.

27 ¹⁸⁶ Day 4, 107:2-9.

1 151. After the rulemaking process began, pro-choice activists targeted
2 Ralph's. On July 31, 2006, at least nine women filed complaints alleging Ralph's
3 does not stock Plan B. They also filed complaints against Walgreen's, Sav-On and
4 Albertson's in Olympia. All four pharmacies referred patients to nearby providers.
5 As with many of the alleged "refusal" stories in evidence, these women were
6 activists who test shopped these pharmacies, even giving advance notice to Ms.
7 Hulet and the Department of Health that they intended to file complaints against
8 the stores.

9 152. In response to the complaints, the Board initiated investigations.
10 Walgreen's, Sav-On, and Albertson's informed the Board that they had referred
11 Plan B customers elsewhere because the drug was temporarily out-of-stock. The
12 investigations of those pharmacies were closed. Ralph's, however, informed the
13 Board that it had a conscientious objection to dispensing Plan B. The
14 investigations remain open.

15 153. When Ralph's position became public, pro-choice groups organized a
16 boycott and staged regular and ongoing protests against both of the Stormans'
17 grocery stores. The Governor's office joined in the boycott, informing Ralph's that
18 after 16 years of doing business with it, the Governor's Mansion would no longer
19 purchase groceries there. Other state officials and agencies similarly participated
20 in the picketing and boycott. Each time the Board takes new action on the issue or
21 in this case, the picketing, boycott, and media attention again focuses on Ralph's.

22 154. During the pickets, protestors stood in the streets, yelling at Ralph's
23 customers and urging customers to sign-up for the boycott. The Stormans had to
24 hire security to patrol the grounds. One activist created a website specifically
25 targeting Ralph's because of its decision to refer patients for religious reasons.

26 155. A pharmacy has been in Ralph's grocery store for nearly 70 years.

1 Ralph's relies heavily on the income and customer traffic generated by the
2 pharmacy. Losing the pharmacy would jeopardize the financial viability of the
3 store. While Ralph's has a compounding and closed-door pharmacy inside its
4 building, the retail pharmacy generates far more profit than any other division
5 owned by the Stormans. Kevin Stormans testified that if the State requires them
6 to stock Plan B or *ella*, the Stormans will be forced to close the pharmacy.

7 156. For the Stormans family, the loss of their fourth-generation business,
8 ending the opportunity to pass it on to the next-generation, would carry with it a
9 significant emotional impact, in addition to the severe cannot monetary
10 consequences.¹⁸⁷

11 157. Defendants suggested that the outcome of the investigation against
12 Ralph's is unknown and that the Board may close the investigation against
13 Ralph's without discipline. The Court finds this suggestion unpersuasive. It begs
14 the question of why the State hasn't already dismissed the complaints if it had any
15 intention of doing so. The Board has completed two separate investigations against
16 Ralph's. The final investigation reports both concluded that Ralph's had customers
17 who requested Plan B and that the store refuses to stock it for conscientious
18 reasons. Kevin Stormans testified that Ralph's has had requests for Plan B and
19 *ella* from new and existing patients. No evidence suggests the circumstances have
20 changed since the Board completed its investigations.

21 158. At trial, the State's counsel repeatedly referred to Ralph's as acting in
22 "outright defiance" of the Stocking and Delivery Rules. Several of the Board
23 witnesses including Chair Gary Harris, former Board member and current
24 Executive Director Susan Teil Boyer, and former Executive Director Lisa Hodgson
25

26 ¹⁸⁷ Day 5, 40:13-22, 106:1-22.

1 testified that they believe Ralph's has violated the Stocking and Delivery Rules.¹⁸⁸
2 Mr. Harris has publicly stated that he will recommend prosecuting religious
3 objectors to the "full extent of the law," and he sits on two of the three
4 investigations that the State admits are pending against Ralph's. Mr. Harris
5 testified that the only disciplinary measure available against pharmacies is
6 revocation. The sanction guidelines suggest this as well, particularly when all of
7 the aggravating factors would apply to Ralph's including Ralph's unwillingness to
8 be "rehabilitated" and the intentional nature of its violation. In sum, Ralph's likely
9 faces eventual revocation of its pharmacy license if the investigations against it
10 are permitted to proceed.

11 **B. Impact on Ms. Mesler and Ms. Thelen.**

12 159. Ms. Mesler and Ms. Thelen have also been harmed by the
13 Regulations. Both unequivocally testified that their religious beliefs prevent them
14 from dispensing or supervising the sale of Plan B or *ella*.

15 160. Ms. Mesler has practiced in Washington State for over 20 years and
16 currently serves as a pharmacy manager. Ms. Thelen has worked as a licensed
17 pharmacist for nearly 40 years. Both have spent thousands of dollars earning their
18 degrees and have completed additional pharmacy courses including learning
19 Spanish to better serve their customers. Both thoroughly enjoy their professions.

20 161. Ms. Mesler and Ms. Thelen have informed all of their employers of
21 their conscientious objection to Plan B. All of these employers have permitted
22 referral, and at each place of employment Ms. Mesler and Ms. Thelen worked
23 primarily alone during their shifts.

24 162. After the Regulations were passed, both employers told Ms. Mesler
25

26 ¹⁸⁸ Day 1, 34:25-35:8; 34:Day 6, 182: 21-25; Day 8, 109:3-6.

1 and Ms. Thelen that they would not be able to accommodate them. They declined
2 for financial reasons to hire a second, on-call, or floater pharmacist to work at the
3 same time. Mesler's employer reiterated in December that she would need to
4 transfer to Oregon or Idaho to remain employed if the Court lifts the injunction.
5 Ms. Thelen has already been constructively discharged as a direct result of the
6 Regulations. While she found another position, that position requires her to work
7 later hours, denies her benefit options that she needed, required her to take a
8 \$16,000 pay cut and significantly lengthened her commute.¹⁸⁹

9 **IX. The Effect of the 2007 Regulations on Catholic pharmacies**

10 163. Plaintiffs are not the only pharmacies or pharmacists with
11 conscientious objections to Plan B and *ella*. The three largest Catholic health
12 systems in this State testified by declarations in this case.¹⁹⁰ Catholic hospitals,
13 like all hospitals, provide an increasing amount of primary care through their
14 emergency rooms—particularly to the poor. Catholic hospitals play an integral role
15 in Washington's health care system. Three in ten of the State's hospital beds are in
16 a Catholic hospital. Together, these three health systems are responsible for 18
17 hospitals, 17 inpatient pharmacies, and 15 outpatient or retail pharmacies in
18 Washington.

19 164. The three largest systems—the Franciscan, Providence, and
20 PeaceHealth Systems—have a religious objection to dispensing Plan B or *ella*. The
21 only exception is that the Catholic Ethical and Religious Directives permit
22 Catholic inpatient pharmacies to dispense Plan B for the treatment of sexual
23 assault victims after appropriate testing. Mr. Shafer testified that it was widely
24 known in the pharmaceutical community at the time of the 2006-07 rulemaking
25

26 ¹⁸⁹ Day 6, 135:11

27 ¹⁹⁰ Dkt #531

1 that Catholic pharmacies did not stock Plan B.

2 165. Despite the widely known fact that Catholic outpatient pharmacies
3 do not stock Plan B or *ella*, the Board has made no effort to enforce the
4 Regulations against those pharmacies, nor has it informed those pharmacies that
5 they must begin stocking those drugs.

6 CONCLUSIONS OF LAW

7 1. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§
8 331 1343, 1367, 2201 and 2202, and under 42 U.S.C. §§ 1983 and 1988.

9 2. At trial, the parties have raised four main legal issues: (1) whether
10 the Ninth Circuit's preliminary injunction ruling on Plaintiffs' free exercise claim
11 constitutes the "law of the case"; (2) whether the Regulations violate the Free
12 Exercise Clause; (3) whether the Regulations violate the Supremacy Clause; and
13 (4) whether the Regulations violate Due Process Clause. The Court addresses each
14 legal issue in turn.

15 I. Law of the Case

16 3. Defendants' primary argument on remand has been that the Ninth
17 Circuit definitively resolved most of the factual and legal issues in this case, and
18 that the only question at trial is whether the rules satisfy the rational basis test.
19 Specifically, they argue that the Ninth Circuit held the Regulations to be "neutral
20 and generally applicable," *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1137 (9th Cir.
21 2009), and that this preliminary-injunction opinion is now the "law of the case."

22 4. This argument fails for several reasons. First, the Ninth Circuit has
23 repeatedly held that "decisions on preliminary injunctions do not constitute law of
24 the case and parties are free to litigate the merits." *Golden State Transit Corp. v.*
25 *City of Los Angeles*, 754 F.2d 830, 832 n.3 (9th Cir. 1985) (emphasis added;
26 internal quotation omitted); *see also* 18B Charles Alan Wright, Arthur R. Miller &

1 Edward H. Cooper § 4478.5 (2d ed. 2002) (preliminary injunction rulings “do not
2 establish law of the case”). This is because preliminary injunction rulings are
3 merely a predication about “the plaintiff’s *likelihood* of success on the merits,” not
4 a decision on “whether the plaintiff has *actually* succeeded on the merits.” *S. Or.*
5 *Barter Fair v. Jackson Cnty., Oregon*, 372 F.3d 1128, 1136 (9th Cir. 2004)
6 (emphasis added). It is also because preliminary injunction rulings are made “on
7 less than a full record.” *Ranchers Cattlemen Action Legal Fund United*
8 *Stockgrowers of Am. v. U.S. Dep’t of Agric.*, 499 F.3d 1108, 1114 (9th Cir. 2007).
9 Thus, upon remand after a preliminary injunction ruling, the lower court is free to
10 make “findings and conclusions to the contrary based upon evidence which may be
11 received at the trial on the merits.” *Washington Capitols Basketball Club, Inc. v.*
12 *Barry*, 419 F.2d 472, 476 (9th Cir. 1969) (emphasis added).

13 5. The reasons for this rule are fully applicable here. First, the question
14 of whether the Regulations are neutral and generally applicable is highly fact-
15 intensive. The answer turns not just on the text of the Regulations, but on “the
16 effect of a law in its real operation.” *Lukumi*, 508 U.S. at 535. As the Ninth Circuit
17 noted, this includes factual questions such as: whether the Regulations are
18 “substantially underinclusive” in practice, *Stormans*, 586 F.3d at 1134; whether
19 the Regulations “actually increase access to medications” in practice; *id.* at 1135;
20 whether the exemptions in the Regulations “are narrow” in practice, *id.*; and
21 whether the Regulations have been “fairly and evenly applied” in practice, *id.*
22 Under *Lukumirl*, this Court must also consider whether the Regulations create “a
23 system of . . . individualized exemptions” based on “the reasons for the relevant
24 conduct.” 508 U.S. at 537. And, although the law on this point is “unsettled,” the
25 Court might also need to consider “the historical background” of the Regulations
26 and the “legislative history.” *Stormans*, 586 F.3d at 1131-32. All of these questions

1 involve factual issues, which make the decision about whether a law is neutral and
2 generally applicable a mixed question of law and fact.

3 6. The factual record on these issues is dramatically different now than
4 it was at the preliminary injunction stage. At the preliminary injunction stage,
5 this Court and the Ninth Circuit were limited to the text of the Regulations, the
6 Board's survey on access to Plan B, a handful of public letters and meeting
7 minutes, and some newspaper articles. There was no evidence on how the
8 Regulations or the exemptions applied in practice; there was no evidence on the
9 Board's discretion to interpret and enforce the Regulations; and there was no
10 evidence on how the Regulations have been enforced in practice.

11 7. There has now been a twelve-day bench trial with 22 witnesses
12 including deposition testimony and hundreds of trial exhibits. There is voluminous
13 new evidence on the scope and application of the Regulations; the effect of the
14 Regulations; the Board's discretion to interpret and enforce the Regulations; the
15 historical background of the regulations; and the enforcement of the Regulations
16 in practice. The parties have also entered binding factual stipulations on key
17 issues, including access to medication. All of this evidence is relevant to the
18 question of whether the regulations are constitutional. None of it was previously
19 before this court or the Ninth Circuit. Accordingly, the Ninth Circuit's ruling does
20 not foreclose "findings and conclusions to the contrary based upon evidence which
21 may be received at the trial on the merits." *Washington Capitols Basketball Club,*
22 *Inc. v. Barry*, 419 F.2d 472, 476 (9th Cir. 1969).

23 8. Beyond the new facts, Plaintiffs have also raised new legal arguments
24 that were not before the Ninth Circuit. For example, Plaintiffs have raised new
25 arguments based on how the exemptions to the Regulations are applied in
26 practice; how the Board has broad discretion to grant individualized exemptions

1 from the Regulations; and how the Regulations have been enforced in practice.
2 None of these legal claims were before the Ninth Circuit; thus, this Court must
3 consider them in the first instance.

4 9. Finally, the Ninth Circuit’s opinion confirms that it had no intention
5 of foreclosing a full trial on the merits. At least seven times, the Court highlighted
6 the unique procedural posture of the case and the “sparse” preliminary-injunction
7 record.¹⁹¹ The Court also said it expected this Court to receive “more recent and
8 comprehensive data” on access to Plan B. *Id.* at 1115 n.2 (emphasis added). And it
9 said it expected this Court to conduct “a trial on the merits” to determine whether
10 “compell[ing] [Plaintiffs] to stock and distribute Plan B . . . violates [Plaintiffs’]
11 constitutional rights.” *Id.* at 1138.

12 10. In short, given the significantly different procedural posture, factual
13 record, and legal arguments, the parties “are free to litigate the merits.” *Golden*
14 *State Transit Corp. v. City of Los Angeles*, 754 F.2d 830, 832 n. 3 (9th Cir. 1985).

15 **II. Free Exercise Clause**

16 11. On the merits, Plaintiffs’ primary claim is that the Regulations
17 violate the Free Exercise Clause because they burden Plaintiffs’ religious beliefs,
18 are not neutral or generally applicable, and cannot satisfy strict scrutiny.

19 _____
20 ¹⁹¹ See:

- 21 • *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1123 (9th Cir. 2009) (“Given the procedural
22 posture of the case, . . . the record with respect to Mesler and Thelen is sparse.”);
- 23 • *id.* at 1126 (“Here, the record is admittedly sparse . . .”);
- 24 • *id.* (noting “the preliminary nature of the record”);
- 25 • *id.* at 1131 (“The evidentiary record . . . [is] thin given the procedural posture of this case . .
26 . . .”);
- 27 • *id.* at 1133 (questioning whether “the record indicates anything about the Board’s
motivation in adopting the final rules”);
- *id.* at 1135 (“Based on the sparse record before it, the district court erred in finding that
access to Plan B was not a problem.”);
- *id.* at 1141 (“While we have the discretion to affirm the district court on any ground
supported by the . . . record, in light of the undeveloped record, we decline to do so.”)
(internal citations and quotations marks omitted).

1 **A. Overview of governing legal principles**

2 12. The Free Exercise Clause of the First Amendment provides:
3 “Congress shall make no law respecting an establishment of religion, or
4 *prohibiting the free exercise thereof . . .*” U.S. Const. amend. I (emphasis added).
5 The Free Exercise Clause has been applied to the States through the Fourteenth
6 Amendment. *Lukumi*, 508 U.S. at 531.

7 13. Under Supreme Court precedent, a law burdening religious exercise
8 generally does not violate the Free Exercise Clause if it is “neutral and generally
9 applicable.” *Employment Division v. Smith*, 494 U.S. 872, 880 (1990). But if the
10 law is “not neutral or not of general application,” it is subject to strict scrutiny;
11 that is, it is unconstitutional unless it is narrowly tailored to advance a compelling
12 governmental interest. *Lukumi*, 508 U.S. at 546. Thus, the key question on the
13 merits is whether the Regulations are “neutral and generally applicable.”

14 14. As the Ninth Circuit has pointed out, two key Supreme Court cases
15 define that phrase—*Smith* and *Lukumi*. *Stormans*, 586 F.3d at 1130. *Smith*
16 involved a blanket criminal ban on possession of peyote. Two Native Americans
17 lost their jobs and were denied unemployment compensation because they ingested
18 peyote at a religious ceremony. *Id.* at 874. The question before the Supreme Court
19 was “whether that [criminal] prohibition [on possession of peyote] is permissible
20 under the Free Exercise Clause.” 494 U.S. at 876. In a 6–3 decision, the Supreme
21 Court upheld the law. According to the Court, “the right of free exercise does not
22 relieve an individual of the obligation to comply with a ‘valid and neutral law of
23 general applicability.’” *Id.* at 879. Because the law was “an across-the-board
24 criminal prohibition on a particular form of conduct,” it was both neutral and
25 generally applicable, and the Court upheld the law. *Id.* at 884.

1 15. *Lukumi* involved four municipal ordinances that restricted the killing
2 of animals. A Santeria priest challenged the ordinances under the Free Exercise
3 Clause, and the key question was whether the ordinances were “neutral and of
4 general applicability.” 508 U.S. at 531. In a 9–0 decision, the Supreme Court
5 struck down the ordinances.

6 16. The first half of the Court’s analysis (Part II.A.1) dealt with the
7 requirement of “neutrality.” As the Court explained, when determining whether a
8 law is neutral, “[f]acial neutrality is not determinative.” *Id.* at 534. Rather, the
9 Free Exercise Clause forbids even “covert” hostility to religion and “subtle
10 departures from neutrality.” *Id.* (quoting *Gillette v. United States*, 401 U.S. 437,
11 452 (1971)). Thus, the courts “must survey meticulously the circumstances of
12 governmental categories to eliminate, as it were, religious gerrymanders.” *Id.*
13 Because the “effect of [the] law in its real operation” was to accomplish a religious
14 gerrymander, the Court held that it was not neutral. *Id.* at 535-38.

15 17. The second half of the Court’s analysis (Part II.B) dealt with the
16 requirement of “general applicability.” As the Court explained, the ordinances fell
17 “well below the minimum standard” of general applicability, because they were
18 substantially “underinclusive” with respect to their stated ends. *Id.* at 543. That is,
19 they “fail[ed] to prohibit nonreligious conduct that endanger[ed] [the
20 government’s] interest in a similar or greater degree than Santeria sacrifice d[id].”
21 *Id.*

22 18. Although the requirements of neutrality and general applicability are
23 “interrelated,” they must be addressed separately. *Stormans*, 586, F.3d at 1130
24 (quoting *Lukumi*, 508 U.S. at 531). Plaintiffs offer six arguments for why the
25 Regulations are not neutral or generally applicable—three involving the
26

1 requirement of general applicability, and three involving the requirement of
2 neutrality:

3 a. *Categorical Exemptions*: The Regulations are not generally applicable
4 because they provide categorical exemptions for secular refusals to
stock or dispense a drug, but not for conscientious objections.

5 b. *Individualized Exemptions*: The Regulations are not generally
6 applicable because they give the government discretion to make
7 individualized exemptions depending on the reasons why a
pharmacy does not stock or dispense a drug.

8 c. *Selective Enforcement*: The Regulations are not generally applicable
9 because they have been selectively enforced against conscientious
10 objections to Plan B.

11 d. *Religious Gerrymandering*: The Regulations are not neutral because
12 they have been gerrymandered to apply almost exclusively to
conscientious objections to Plan B.

13 e. *Discriminatory Intent*: The Regulations are not neutral because they
14 were enacted with discriminatory intent.

15 f. *Differential Treatment*: The Regulations are not neutral because they
16 provide differential treatment among religions.

17 19. This Court will address the requirement of general applicability first,
18 since that is where Plaintiffs place the most emphasis.

19 **B. General Applicability – Categorical Exemptions**

20 20. Under the general applicability requirement, this Court must
21 evaluate whether the Regulations are “substantially underinclusive.” *Stormans*,
22 586 F.3d at 1134. One way to prove that a law is substantially underinclusive is to
23 show that the law “creates a categorical exemption for individuals with a secular
24 objection but not for individuals with a religious objection.” *Fraternal Order of*
25 *Police*, 170 F.3d at 365 (Alito, J.); accord *Lukumi*, 508 U.S. at 542; *Canyon Ferry*
26 *Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021, 1035 (9th
27 Cir. 2009) (Noonan, J., concurring); *Blackhawk v. Pennsylvania*, 381 F.3d 202, 211

1 (3d Cir. 2004) (Alito, J.); *Rader v. Johnston*, 924 F.Supp. 1540, 1551-53 (D. Neb.
2 1996)

3 21. In *Fraternal Order of Police*, for example, a police department
4 adopted a regulation prohibiting officers from growing beards. The regulation
5 granted an exemption for beards grown for medical reasons, but refused an
6 exemption for beards grown for religious reasons. Because this represented a
7 “value judgment in favor of secular motivations, but not religious motivations,” the
8 law was not neutral and generally applicable. *Id.* at 366.

9 22. Thus, the key question under *Fraternal Order of Police* and *Lukumi*
10 is whether the law exempts “nonreligious conduct that endangers [the
11 government’s] interests in a similar or greater degree than [the prohibited
12 religious conduct].” *Lukumi*, 508 U.S. at 543; accord *Fraternal Order of Police*, 170
13 F.3d at 366. So, for example, if a law prohibits animal killing for religious reasons,
14 but exempts similar animal killing for nonreligious reasons, the law is not
15 generally applicable. *Lukumi*, 508 U.S. at 543. And if a law prohibits beards grown
16 for religious reasons, but exempts similar beards grown for medical reasons, the
17 law is not generally applicable. *Fraternal Order of Police*, 170 F.3d at 366.

18 23. Here, the relevant religious conduct is providing a facilitated referral
19 when a patient requests Plan B—either because the pharmacy does not stock Plan
20 B as a matter of conscience, or because an individual pharmacist cannot dispense
21 it for reasons of conscience. The question is whether the Regulations permit
22 nonreligious referrals that undermine timely access to medication just as much as
23 these religiously motivated referrals would.

24 24. At the preliminary injunction stage, when the only relevant evidence
25 consisted of the text of the Regulations, the Ninth Circuit concluded that all of the
26

1 exemptions in the Regulations “are narrow,” and that none permits secular
2 conduct that undermines “access to medications.” 586 F.3d at 1135.

3 25. But after twelve days of trial, including voluminous testimony and
4 documentary evidence on the scope and application of the exemptions, it is clear
5 that the exemptions are not as “narrow” as they may once have appeared, and that
6 they permit a wide variety of nonreligious referrals “that endanger[] [the
7 government’s] interests in a similar or greater degree than” Plaintiffs religiously
8 motivated referrals. *Lukumi*, 508 U.S. at 543.

9 26. The following chart summarizes the evidence on what types of
10 referrals are permitted under the Regulations:

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27 PLAINTIFFS’ PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW - 70
(C07-5374)

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	Reason for Referral	Prohibited by the Regulations	Permitted Categorically	Permitted in Practice
1	Pharmacy does not stock or deliver Plan B or <i>ella</i> for reasons of conscience	X		
2	Pharmacy does not deliver the drug because it is temporarily out of stock for business or convenience reasons		X	
3	Pharmacy does not deliver the drug because it chooses not to accept the patient's insurance due to low reimbursement rates or administrative challenges		X	
4	Pharmacy does not deliver the drug because it does not accept Medicaid or Medicare		X	
5	Pharmacy does not deliver Plan B because the patient is under 17 and the pharmacist on duty is not part of a Collaborative Agreement Program		X	
6	Pharmacy does not deliver the drug because the pharmacist believes the patient might be a drug seeker		X	
7	Pharmacy does not deliver lethal drugs (assisted suicide) for reasons of conscience. RCW 70.245.190(1)(d).		X	
8	Pharmacy does not deliver syringes because pharmacist was unable to satisfy herself that it is intended for legal use. RCW 70.115.150.		X	
9	Pharmacy does not stock the drug because it falls outside the pharmacy's chosen business niche		X	
10	Pharmacy does not stock the drug because it determines that it has insufficient demand to trigger the Stocking Rule		X	
11	Pharmacy does not stock the drug because it does not want to obtain specialized equipment or expertise		X	
12	Pharmacy does not stock the drug because it is forbidden to do so by a contract with its supplier		X	
13	Pharmacy does not deliver the drug because the pharmacist would have to perform simple compounding			X

PLAINTIFFS' PROPOSED FINDINGS OF FACT
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	Reason for Referral	Prohibited by the Regulations	Permitted Categorically	Permitted in Practice
14	Pharmacy does not deliver the drug because it declines to do unit dosing or blister packing			X
15	Pharmacy does not deliver the drug over the counter because it requires extra recordkeeping (e.g., Sudafed)			X
16	Pharmacy does not deliver syringes over the counter because of clientele concerns			X
17	Pharmacy does not deliver the drug because the patient is disruptive, violates the store's dress code, or the pharmacy believes the patient may be a shoplifter			X
18	Pharmacy does not stock the drug because in the discretion of the pharmacy there is low demand			X
19	Pharmacy does not stock the drug because of its carrying costs (e.g., the pharmacy must order more of the drug than the patient requires)			X
20	Pharmacy does not stock the drug because it has a short shelf-life			X
21	Pharmacy does not stock the drug because it lacks adequate shelf space to carry all drugs needed by patients			X
22	Pharmacy does not stock the drug because it is an expensive drug			X
23	Pharmacy does not stock the drug unless the patient calls to request the drug in advance			X
24	Pharmacy does not stock the drug because the pharmacist would have to monitor the patient (e.g., Accutane)			X
25	Pharmacy does not stock Schedule V cough syrup or Schedule V pain-management drugs because of recordkeeping or clientele concerns			X
26	Pharmacy does not stock the drug because it would attract crime (e.g., Oxycontin)			X
27	Pharmacy does not stock a drug because it is not on the formulary list of the insurers primarily used by the pharmacy's patients			X
28	Pharmacy does not stock a drug because it is part of a larger chain, which concentrates all of that drug in one pharmacy in the region			X

PLAINTIFFS' PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW - 72
(C07-5374)

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2 27. The Regulations contain several exemptions—some written in the
3 text of the Regulations, some unwritten. Most obvious are the five written
4 exemptions from the Delivery Rule:

- 5 a. *Erroneous prescription*: The prescription contains “an obvious or
6 known error, inadequacies in the instructions, known
7 contraindications,” etc.;
- 8 b. *National emergency*: “National or state emergencies or guidelines”
9 limit availability of the drug;
- 10 c. *Specialized equipment or expertise*: The pharmacy lacks “specialized
11 equipment or expertise needed to safely produce, store, or dispense
12 drugs or devices”;
- 13 d. *Fraudulent prescription*: The prescription is “potentially fraudulent”;
14 e. *Out of stock*: The drug is out of stock despite “good faith compliance”
15 with the Stocking Rule.

16 WAC 246-869-010(1)(a)-(e).

17 28. In addition to these five exemptions, there is also a “catch-all”
18 exemption and a “customary payment” exemption:

- 19 a. *Catch-all*: Any circumstances that are “substantially similar” to the
20 first five exemptions; and
- 21 b. *Customary payment*: The customer does not pay the “usual and
22 customary or contracted charge.”

23 WAC 246-869-010(1)-(2).

24 29. Plaintiffs do not contest three of these exemptions, and with good
25 reason. The “erroneous prescription” exemption simply protects patients’ health;
26 the “national emergency” exemption covers situations beyond the control of the
27 pharmacy; and the “fraudulent prescription” exemption prevents fraud and drug

1 abuse. As the Ninth Circuit pointed out, none of these exemptions permits conduct
2 that would interfere with timely, safe access to lawful medication. *Stormans*, 586
3 F.3d at 1135.

4 30. By contrast, the other four exemptions, in practice, exempt a wide
5 variety of referrals that undermine the government’s alleged interest in ensuring
6 timely access to lawful medication.

7 31. *First* is the “specialized equipment or expertise” exemption. WAC
8 246-869-010(1)(c). This exemption ensures that pharmacies are under no
9 obligation to *stock* drugs that require specialized equipment or expertise. So, for
10 example, even though a pharmacy might receive numerous requests for a
11 particular drug, and even though it might be the only pharmacy in a rural area, it
12 has no obligation to purchase the specialized equipment and begin stocking the
13 drug. Thus, a pharmacy may refer such patients elsewhere even when such a
14 referral would undermine access to medication. This exemption also arguably
15 permits pharmacies to refer patients elsewhere for simple compounding, to avoid
16 having to register with the manufacturer for a drug or monitor the patient’s blood
17 work

18 32. *Second* is the “customary payment” exemption. WAC 246-869-010(2).
19 As the Ninth Circuit pointed out, “[n]obody could seriously question a refusal to fill
20 a prescription because the customer did not pay for it.” *Stormans*, 586 F.3d at
21 1135. But the evidence at trial demonstrated that this exemption is far broader
22 than just protecting against non-payment. Rather, the Board interprets this
23 exemption broadly to allow referrals for all sorts of business decisions that have
24 nothing to do with non-payment.

25 a. For example, pharmacies are categorically permitted to decline to
26 accept insurance plans for any reason at all, even when the pharmacy

1 wishes to avoid the insurer's onerous audit requirements, or the
2 reimbursement rates are just as high as those of other insurance
3 plans. Thus, a customer who is effectively offering full payment can
4 be referred elsewhere, even when such a referral would undermine
5 timely access to medication.

6 b. The same is true for pharmacies that refuse to accept Medicare Part
7 B, State Labor and Industries or Medicaid. This imposes a significant
8 barrier to access for patients who rely on these programs.

9 c. Many compounding pharmacies refuse to accept insurance at all.
10 Thus, patients who cannot afford to pay cash, but do have insurance,
11 can be completely denied access to essential drug compounds.

12 33. All of these practices are categorically permitted under the
13 Regulations. And as several Board members conceded, they can impose a far more
14 serious barrier to access than Plaintiffs' religiously motivated referrals for Plan B.
15 At trial, for example, Board witnesses considered two hypothetical scenarios. In
16 one scenario, a woman is referred elsewhere for Plan B because she offers to pay
17 with unacceptable insurance. The pharmacy is in a rural area with no other
18 pharmacies nearby, and the woman is unable to obtain Plan B and becomes
19 pregnant. Both Board witnesses agreed that this represents a serious problem of
20 access, and both agreed it is categorically permitted under the Regulations.

21 34. In the other scenario, a woman is given a facilitated referral for Plan
22 B because of a conscientious objection. There are dozens of nearby pharmacies that
23 stock Plan B, and she obtains it without delay. Both Board witnesses agreed that
24 this sort of a facilitated referral is not a barrier to access, yet both agreed it is
25 prohibited under the Regulations.. In short, this is a straightforward concession
26 that the Regulations permit nonreligious referrals "that endanger[] [the

1 government's] interests in a similar or greater degree" Plaintiffs religiously
2 motivated referrals. *Lukumi*, 508 U.S. at 543.

3 35. Moreover, under the "customary payment" exemption, pharmacies
4 are not even required to refer patients to another pharmacy. Under subsection (3)
5 of the Delivery Rule, when a pharmacy does not deliver a drug, the pharmacy
6 must provide a "timely alternative." WAC 246-869-010(3). But this duty applies
7 only if the drug is "not in stock" or "the prescription cannot be filled" under
8 subsection (1)(a) (*i.e.*, a prescription with a known error, inadequate instructions,
9 or contraindications). *Id.* The duty to provide a timely alternative does not apply if
10 the patient is unable to pay the "usual and customary or contracted charge." WAC
11 246-869-010(2). Thus, a patient who presents unacceptable insurance need not
12 even be referred to another pharmacy. That is a far more serious barrier to access
13 than the facilitated referrals provided by Plaintiffs.

14 36. The *third* major exemption to the Delivery Rule is the "catch-all"
15 exemption. It applies in any circumstances that are "substantially similar" to the
16 enumerated list. WAC 246-869-010(1). It will be addressed in more detail below.

17 37. *Fourth* is the "out of stock" exemption. WAC 246-869-010(1)(e). It
18 broadly allows pharmacies to refuse to deliver a drug whenever the drug is out of
19 stock—as long as the pharmacy is in "good faith compliance" with the Stocking
20 Rule. *Id.*; WAC 246-869-150(1). Thus, the scope of this exemption depends on the
21 scope of the Stocking Rule.

22 38. The evidence at trial demonstrated that the Stocking Rule, together
23 with the "out of stock" exemption, allows pharmacies to refer patients elsewhere
24 for a wide variety of nonreligious reasons. For example, niche pharmacies are
25 categorically permitted to decline to stock drugs that fall outside their chosen
26 business niche. Pharmacies are also categorically permitted to decline to stock a

1 drug if they have not had any patients request it, if their supplier contractually
2 excludes a drug from their formulary, or if the drug would require specialized
3 training or equipment that the pharmacy does not wish to purchase. In all of these
4 situations, pharmacies are permitted to refer patients elsewhere, regardless of the
5 effect on access to medication.

6 39. Similarly, even when a pharmacy typically stocks a drug, it is
7 permitted to refer patients elsewhere when a drug is temporarily out of stock. This
8 can occur for any number of reasons: *e.g.*, a pharmacy experiences an unexpected
9 spike in demand; a pharmacy is trying to reduce its inventory to become more
10 profitable; an inexperienced pharmacy manager does a poor job of managing
11 inventory. In all of these situations, pharmacies are categorically permitted to
12 refer patients elsewhere, regardless of the effect on access to medication.

13 40. Again, Board witnesses considered two scenarios at trial that
14 illustrate the breadth of this exemption. In one scenario, a woman is referred
15 elsewhere for Plan B because the drug is temporarily out of stock due to poor
16 inventory management. The pharmacy is in a rural area with no other pharmacies
17 nearby, and the woman is unable to obtain Plan B and becomes pregnant. Board
18 witnesses agreed that this represents a serious problem of access and that it is
19 categorically permitted under the Regulations.

20 41. In the other scenario, a woman is referred elsewhere for Plan B
21 because of a conscientious objection and obtains the drug immediately thereafter.
22 Board witnesses agreed that this does not present an access problem, but agreed
23 that it is prohibited under the Regulations. . Again, this is a straightforward
24 concession that the Regulations permit nonreligious referrals “that endanger[] [the
25 government’s] interests in a similar or greater degree” Plaintiffs religiously
26 motivated referrals. *Lukumi*, 508 U.S. at 543.

1 42. At the preliminary injunction stage, the Ninth Circuit suggested that
2 eliminating these categorical exemptions “would likely drive pharmacies out of
3 business Therefore, the exemptions actually increase access to medications by
4 making it possible for pharmacies to . . . maintain their business.” *Stormans*, 586
5 F.3d at 1135. The Defendants did not assert this argument at trial. If they had,
6 they would face two obstacles.

7 43. First, Defendants offered no evidence that the categorical exemptions
8 are necessary to keep pharmacies in business. It is quite possible that narrowing
9 or eliminating some of the exemptions would be fully compatible with keeping
10 pharmacies in business *and* expanding access to medication. For example,
11 requiring all pharmacies to accept Medicaid as many do, could significantly
12 increase access to medication for the poor without driving pharmacies out of
13 business.

14 44. Second, even assuming Defendants had offered evidence on this
15 point, the same “out of business” argument applies to exemptions for reasons of
16 conscience. Specifically, it is undisputed that if Ralph’s is forced to stock Plan B, it
17 will have to close its pharmacy. And it is undisputed that if Thelen and Mesler are
18 forced to dispense Plan B, they have to leave the profession or move to another
19 state. Indeed, the Board conceded in the Final Significant Analysis that some
20 pharmacy owners would close their business rather than violate their
21 conscience.¹⁹² Thus, it is undisputed that the Regulations will force at least some
22 pharmacies and pharmacists out of business, further reducing access to
23 medication.

24 45. In short, the State cannot have it both ways. It cannot provide secular
25 exemptions on the ground that they will help keep pharmacies in business, while

26 ¹⁹² PX 434, pp. 11-12.

1 denying parallel religious exemptions that are just as necessary to keep
2 pharmacies in business. That would represent an impermissible “value judgment
3 in favor of secular motivations, but not religious motivations.” *Fraternal Order of*
4 *Police*, 170 F.3d at 366.

5 46. In light of the vast range of secular conduct exempted from the
6 Regulations, this case is significantly stronger than *Fraternal Order of Police*.
7 There, the Third Circuit held that the beard prohibition was not neutral and
8 generally applicable because there was *one* secular exemption for a *narrow slice* of
9 secular conduct—beards worn for medical reasons. Here, there are *numerous*
10 secular exemptions for a *wide variety* of secular conduct—everything from
11 business reasons for not stocking a drug, to convenience reasons for not wanting to
12 deal with a particular insurer, to practical reasons for wanting to serve a
13 particular niche market. These secular exemptions routinely result in patients
14 being unable to obtain a drug on demand from the pharmacy of their choice. Thus,
15 they “endanger[] [the government’s] interests” just as much as a narrow exemption
16 for conscience would. *Lukumi*, 508 U.S. at 543.

17 47. Several other cases support the same result. *See Blackhawk v.*
18 *Pennsylvania*, 381 F.3d 202, 211 (3d Cir. 2004) (Alito, J.) (fee requirement for
19 keeping wildlife was not generally applicable where it included categorical
20 exemptions for zoos and circuses, but not for Native American religious
21 adherents); *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*,
22 556 F.3d 1021, 1035 (9th Cir. 2009) (Noonan, J., concurring) (campaign finance
23 requirements were not generally applicable where they included categorical
24 exemptions for newspapers and media, but not for churches); *Rader v. Johnston*,
25 924 F.Supp. 1540, 1551-53 (D. Neb. 1996) (rule requiring freshmen to live on
26 campus was not generally applicable where it included categorical exemptions for
27

1 students with certain secular objections, but not religious objections); *Morr-Fitz,*
2 *Inc. v. Blagojevich*, 2011 WL 1338081, No. 2005-CH-000495 (Ill. Cir. Ct. 7th Jud.
3 Cir. 04/05/11) (striking down pharmacy rule modeled on Washington’s
4 Regulations).

5 48. Finally, in addition to the broad categorical exemptions for business
6 and convenience reasons, the Washington Death with Dignity Act, RCW 70.425
7 (“DWDA”), creates another categorical exemption to the Regulations. The DWDA
8 provides that “[o]nly willing health care providers [defined to include pharmacists]
9 shall participate in the provision to a qualified patient of medication to end his or
10 her life in a humane and dignified manner.” RCWA 70.245.190(1)(d). Thus,
11 notwithstanding the Regulations, any pharmacy or pharmacist may refuse to
12 dispense lethal drugs on any ground, secular or religious. And there appears to be
13 no referral obligation. This exemption undermines the government’s stated
14 interest in assuring timely access to lethal drugs at least as much as conscientious
15 objections to Plan B. Thus, it provides an additional ground for finding the
16 Regulations not generally applicable.

17 **C. General Applicability – Individualized Exemptions**

18 49. In addition to categorical exemptions, another way that a law might
19 fail to be generally applicable is if “creates a regime of individualized,
20 discretionary exemptions. *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir.
21 2004) (Alito, J.); *see also Lukumi*, 520 U.S. at 537. A law allowing “individualized
22 exemptions” requires strict scrutiny because it “creates the opportunity for a
23 facially neutral and generally applicable standard to be applied in practice in a
24 way that discriminates against religiously motivated conduct.” *Blackhawk*, 381
25 F.3d at 209 (citing *Smith*).

1 50. Three cases illustrate the “individualized exemptions” rule. In
2 *Blackhawk*, the government required any person wishing to keep wildlife in
3 captivity to pay a permitting fee; but it allowed the government to waive the fee if
4 a waiver would be “consistent with sound game or wildlife management activities
5 or the intent of [the Game and Wildlife Code].” *Id.* at 205. The Third Circuit held
6 that this provision was “sufficiently open-ended” to give the government discretion
7 in granting exemptions, thus “bring[ing] the regulation within the individualized
8 exemption rule” and requiring strict scrutiny. *Id.* at 210. Thus, it held that the
9 denial of a waiver to a Native American who wanted to keep a bear for religious
10 reasons violated the Free Exercise Clause. *Id.* at 213-14.

11 51. Similarly, in *Lukumi*, one of the ordinances punished any person who
12 “unnecessarily . . . kills any animal.” 508 U.S. at 537 (emphasis added). This
13 provision, the Court said, “requires an evaluation of the particular justification for
14 the killing” to determine whether it was “necessary” or not. *Id.* Because the
15 government must look at “the reasons for the relevant conduct” and create
16 “individualized exemptions” on a case-by-case basis, the ordinance was subject to
17 strict scrutiny. *Id.*

18 52. Third, in *Sherbert v. Verner*, 374 U.S. 398, 401 (1963), the
19 government denied unemployment compensation to any person who quit or
20 refused work “without good cause.” The Supreme Court struck down the denial of
21 unemployment compensation under this provision to a plaintiff who refused to
22 work on the Sabbath. *Id.* at 408-09. As the Supreme Court explained in *Smith*, the
23 “good cause” language triggered strict scrutiny because it “lent itself to
24 individualized governmental assessment of the reasons for the relevant conduct,”
25 and it “created a mechanism for individualized exemptions.” 494 U.S. at 884
26 (quoting *Bowen v. Roy*, 476 U.S. 693, 708 (1986)).

1 53. In short, when a law permits the government to make “individualized
2 exemptions” on a case-by-case basis, the law is subject to strict scrutiny. This is
3 because, when the government applies an “across-the-board” prohibition, there is
4 little risk that it is discriminating against religious conduct. *Smith*, 494 U.S. at
5 884. But when an open-ended law gives the government discretion to grant
6 exemptions on a case-by-case basis, it creates a serious risk that it will be “applied
7 in practice in a way that discriminates against religiously motivated conduct.”
8 *Blackhawk*, 381 F.3d at 209 (citing *Smith*). Such a risk justifies strict scrutiny. *Id.*

9 54. Here, the Regulations include several open-ended provisions that
10 allow the Board to grant individualized exemptions on a case-by-case basis. First,
11 the Delivery Rule, after enumerating five specific exemptions, provides an open-
12 ended exemption for any circumstances that are “substantially similar.” WAC 246-
13 869-010(1). When a pharmacy claims this open-ended exception, the Board must
14 examine the underlying reasons for the pharmacy’s conduct on a case-by-case basis
15 to determine whether it qualifies for an exemption. This is a quintessential
16 “individualized . . . assessment of the reasons for the relevant conduct.” *Lukumi*,
17 508 U.S. at 537 (quoting *Smith*).

18 55. State Defendants argue that this exemption is narrow, because four
19 of the enumerated exemptions are limited to patient safety concerns, such as
20 “fraudulent prescriptions,” “contraindications,” and “[l]ack of specialized
21 equipment.” WAC 246-869-010(1) But this ignores the *fifth* enumerated
22 exemption, which applies any time a drug is out of stock “despite good faith
23 compliance with” the Stocking Rule. WAC 246-869-010(1)(e). This exemption is not
24 about patient safety; it is about giving pharmacies flexibility to “maintain their
25 business” by deciding which drugs to keep in stock. *Stormans*, 586 F.3d at 1135.
26 Thus, when a pharmacy claims the open-ended exemption, the Board must

1 consider on a case-by-case basis whether the relevant conduct is “substantially
2 similar” to the many stocking decisions that are currently permitted under the
3 Regulations.

4 56. For example, if Plaintiffs were to claim the open-ended exemption,
5 the Board would have to consider on a case-by-case basis whether a religious
6 refusal to stock a drug is “substantially similar” to a niche pharmacy’s refusal to
7 stock a drug. Such an inquiry creates a significant risk that the Regulations will
8 be “applied in practice in a way that discriminates against religiously motivated
9 conduct.” *Blackhawk*, 381 F.3d at 209 (citing *Smith*).

10 57. Second, in addition to the open-ended exemption, there is an
11 exemption for “good faith” compliance with the Stocking Rule. No Board witness
12 was able to give a definition of “good faith.” In fact, Board witnesses consistently
13 testified that that “good faith” compliance must be assessed on a case-by-case basis
14 depending on the reasons for the relevant conduct. That, too, is a quintessential
15 “individualized assessment” under *Lukumi*.

16 58. Finally, the Stocking Rule itself is extraordinarily vague and open-
17 ended. It provides that a pharmacy must maintain “at all times” a “representative
18 assortment” of drugs to meet the needs of its “patients.” WAC 246-869-150(1).
19 Neither “all times,” nor “representative assortment,” nor “patients” is defined.
20 Board witnesses repeatedly emphasized that these terms must be interpreted on a
21 case-by-case basis depending on the reasons for the relevant conduct. Thus, in
22 practice, the Board has broad discretion to allow pharmacies to refuse to stock
23 drugs for business, economic, and convenience reasons, but to punish pharmacies
24 for refusing to stock drugs for religious reasons. And in practice, that is precisely
25 how the Stocking Rule has been enforced.

1 59. In light of these individualized exemptions, this case is significantly
2 more problematic than *Blackhawk*. There, the government had discretion to waive
3 the wildlife permitting fee if a waiver would be “consistent with sound game or
4 wildlife management activities or the intent of [the Game and Wildlife Code].” *Id.*
5 at 205. The Third Circuit held that this provision was “sufficiently open-ended” to
6 require strict scrutiny. *Id.* at 210. Here, there are at least three provisions that are
7 equally open-ended, and the Board has allowed pharmacies to refer patients
8 elsewhere for a wide variety of business, economic, and convenience reasons.

9 60. This case is also similar to *Axson-Flynn v. Johnson*, 356 F.3d 1277
10 (10th Cir. 2004). There, the plaintiff was a Mormon theater student who wished to
11 be exempt from the requirement to recite portions of a script that were offensive to
12 her religious beliefs. *Id.* 1281-83. The state university refused, claiming that it had
13 a neutral rule requiring all theater students to adhere to all curricular
14 requirements, including performing scripts as written. The Tenth Circuit,
15 however, disagreed. It pointed out that the university had granted an exemption to
16 a Jewish student who wanted to miss an assignment for Yom Kippur, *id.* at 1298,
17 and it had sometimes granted the plaintiff herself an exemption from reciting
18 every portion of a script, *id.* This “pattern of ad hoc discretionary decisions,” said
19 the Court, amounted to a “system of individualized exemptions” requiring strict
20 scrutiny. *Id.* at 1299. The same is true here. The Board exercises broad discretion
21 under the Regulations to permit a wide variety of secular referrals on an *ad hoc*,
22 case-by-case basis. Such a system of individualized exemptions requires strict
23 scrutiny.

24 61. This case is also like the system of individualized exemptions in
25 *Sherbert* and *Lukumi*. In those cases, the government had authority to deny
26 unemployment compensation for “good cause,” *Sherbert*, 374 U.S. at 401, and had

1 authority to punish animal killing that was “unnecessar[y],” *Lukumi*, 508 U.S. at
2 537. Here, the Board has authority to regulate religious conduct based on whether
3 it is “substantially similar” to other conduct, WAC 246-869-010(1), whether it was
4 undertaken in “good faith,” 246-869-010(1)(e), and whether it complies with an
5 open-ended Stocking Rule that has never been enforced against any other
6 pharmacy. The Board’s discretion under the Regulations is far broader than any
7 discretion at issue in *Sherbert* or *Lukumi*.

8 62. Finally, this case is similar to *Rader v. Johnston*, 924 F. Supp. 1540
9 (D. Neb. 1996). There, a state university required all full-time freshmen to live on-
10 campus their freshman year, subject to three enumerated exceptions. *Id.* at 1544.
11 But in practice, the university administrators “grant[ed] exceptions to the policy,
12 at their discretion, in a broad range of circumstances not enumerated in the rule
13 and not well defined or limited.” *Id.* at 1552. Thus, the court held that the policy
14 “cannot be viewed as generally applicable.” *Id.* at 1553. Here, too, the Board has
15 discretion to grant exemptions in a broad range of circumstances not enumerated
16 in the Regulations and not well defined. And, in fact, pharmacies across the state
17 continue to refer patients elsewhere every day for a wide variety of business,
18 economic, and convenience reasons, and the Board has shown no interest in
19 prohibiting those referrals.

20 **D. General Applicability – Selective Enforcement**

21 63. Aside from categorical exemptions and individualized exemptions, a
22 law is also not generally applicable when it has “been enforced in a discriminatory
23 manner.” *Blackhawk*, 381 F.3d at 209 (Alito, J.) (citing *Tenaflly*, 309 F.3d at 167-
24 72). In *Tenaflly*, for example, a local ordinance broadly banned the placement of
25 any “sign or advertisement, or other matter upon any pole, tree, curbstone,
26 sidewalk or elsewhere, in any public street or public place” 309 F.3d at 151. In

1 practice, the local government permitted the placement on utility poles of a variety
2 of signs and symbols, such as house number signs, lost animal signs, and the like;
3 but it refused to permit Orthodox Jews to do the same with religiously significant
4 items called *lechis* (thin black strips of plastic demarcating the area within which
5 Orthodox Jews may carry objects on the Sabbath). *Id.* at 151-52. Although the
6 ordinance was plainly neutral and generally applicable on its face, the Court
7 struck it down because the government’s “selective, discretionary application” of
8 an “often-dormant [o]rdinance” was “sufficiently suggestive of discriminatory
9 intent” to require strict scrutiny. *Id.* at 168.

10 64. Similarly, in *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F.3d 790
11 (9th Cir. 2011), a state university required all registered student groups to abide
12 by a nondiscrimination policy. Under this policy, the university denied recognition
13 to a Christian fraternity and sorority because they required all members to be
14 Christians. *Id.* at 795-96. Although the Ninth Circuit concluded that the
15 nondiscrimination policy was neutral and generally applicable on its face, it held
16 that it would be unconstitutional if it had been applied selectively—for example,
17 by “grant[ing] certain groups exemptions from the policy” but denying an
18 exemption to religious groups. *Id.* at 804-05.

19 65. Here, the evidence at trial establishes that the Regulations have been
20 selectively enforced. Specifically, it is undisputed that in the four years since the
21 Delivery Rule went into effect, no pharmacy has ever been cited for violating it.
22 And in the *forty* years since the Stocking Rule went into effect, no pharmacy has
23 even been *investigated* for violating it, other than Ralph’s and three other nearby
24 pharmacies because of complaints filed by Plan B test-shoppers. The
25 investigations against the three pharmacies were promptly closed when they
26 informed the Board they were temporarily out of Plan B and would order it, but

1 investigations against Ralph's remain open to this day. Thus, pharmacies across
2 the state have enjoyed broad discretion to decline to stock drugs and to refer
3 patients elsewhere for a wide variety of nonreligious reasons; but Ralph's alone
4 faces punishment for declining to stock Plan B for religious reasons.

5 66. Defendants offer two arguments in response. First, they argue that
6 there can be no selective enforcement because the Board has not yet enforced the
7 Regulations against Ralph's. In support, they point to several complaints against
8 Ralph's that have been dismissed.

9 67. This is unconvincing. Most, if not all, of those complaints were
10 dismissed on technicalities—not because the Board has decided that Ralph's has
11 complied with the Regulations. To the contrary, it is undisputed that Ralph's is in
12 violation of the Stocking Rule and has several pending complaints against it that
13 have been stayed by this litigation. Thus, the Board must either ignore outright
14 defiance of the Regulations (which suggests that they are not generally
15 applicable), or enforce the Regulations against Ralph's.

16 68. Second, as discussed above, the State argues that the reason the
17 Board has never enforced the Regulations against any other pharmacy is because
18 the Board's enforcement is "complaint-driven"—*i.e.*, it enforces the Regulations
19 only in response to citizen complaints..

20 69. This argument fails for three reasons. First, enforcement of the
21 Board's Regulations is not exclusively complaint-driven. It is not even primarily
22 complaint-driven. Rather, the Board ensures compliance with its Regulations
23 through a wide variety of channels. For example, it conducts inspections every two
24 years; it publishes regular newsletters informing pharmacies of their duties under
25 the Board's regulations; it publishes guidance on its regulations; it works with the
26 WSPA to promote compliance; and it can even initiate its own complaints. As

1 Gary Harris testified, less than one percent of pharmacies ever have a complaint
2 filed against them at all. Thus, responding to citizen complaints is only a very
3 small part of how the Board ensures compliance with its regulations.

4 70. When considering the broad range of enforcement tools available to
5 the Board, it is clear that the Board has made no effort to enforce the Stocking
6 Rule against pharmacies that decline to stock drugs for business reasons. It makes
7 no effort to check for compliance with the Stocking Rule during inspections, even
8 though it could do so; it has never mentioned compliance with the Stocking Rule in
9 its quarterly newsletters; it has never issued guidance so that pharmacies can
10 understand their obligations under the Stocking Rule; and it has never initiated
11 its own complaint based on a violation of the Stocking Rule (except against
12 Ralph's). In short, the Board has never shown any interest in enforcing the
13 Stocking Rule, until it invoked that rule against Ralph's. As in *Tenaflly*, "the
14 [Board's] invocation of the often-dormant [Stocking Rule] against conduct
15 motivated by [religious] beliefs is 'sufficiently suggestive of discriminatory intent,'
16 . . . that we must apply strict scrutiny." 309 F.3d at 168.

17 71. Second, even assuming the Board were complaint-driven, that would
18 not solve the selective enforcement problem. In this case, relying on citizen
19 complaints has only made the selective enforcement problem worse. For the vast
20 majority of patients and pharmacies, a referral is never going to generate a
21 complaint. But the evidence at trial demonstrated that Planned Parenthood and
22 other pro-choice groups have conducted an active campaign to seek out pharmacies
23 and pharmacists with religious objections to Plan B and to file complaints. This
24 has resulted in a severely disproportionate number of investigations directed at
25 religious objections to Plan B.

1 72. The Supreme Court condemned a similar arrangement in *City of*
2 *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), which the Ninth Circuit
3 has expressly relied on in the Free Exercise context, *Alpha Delta Chi-Delta*, 648
4 F.3d at 804. There, a home for the mentally retarded sought a special use permit
5 under a zoning ordinance. But the city denied the permit in response to the
6 “negative attitudes” and “fear” of neighbors. *Id.* at 448. The Supreme Court struck
7 down the enforcement of the ordinance as unconstitutional: “Private biases may be
8 outside the reach of the law,” the Court said, “but the law cannot, directly or
9 indirectly, give them effect.” *Id.* (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433
10 (1984)). That, unfortunately, is how the Regulations have operated here. By
11 relying on citizen complaints, the Board ensures that secular referrals are
12 protected, while unpopular conscience-based referrals are prohibited. That is
13 selective enforcement.

14 73. Finally, Defendants’ reliance on *Rosenbaum v. City and County of*
15 *San Francisco*, 484 F.3d 1142 (9th Cir. 2007) is misplaced for several reasons.
16 First, *Rosenbaum* involved a selective enforcement challenge under the Equal
17 Protection Clause, not the Free Exercise Clause. The legal standards under each
18 clause are different. To prevail under the Equal Protection Clause, the plaintiff
19 must demonstrate *both* (1) that the government’s enforcement “had a
20 discriminatory effect” *and* (2) that “the [government was] motivated by a
21 discriminatory purpose.” *Rosenbaum*, 484 U.S. at 1152-53. Once this has been
22 shown, the government is held strictly liable; the government gets no opportunity
23 to show that it satisfies strict scrutiny.

24 74. Under the Free Exercise Clause, by contrast, the plaintiff need only
25 show that the government enforced the law against religious conduct while
26 exempting similarly situated nonreligious conduct. *Tenafly*, 309 F.3d at 167. That

1 is enough to infer a discriminatory purpose, without regard to “the subjective
2 motivations of the [government officials]” who enforced the law. *Id.* at 168 n.30; *see*
3 *also Alpha Delta Chi-Delta*, 648 F.3d at 805-04. The government then has an
4 opportunity to show that its actions satisfy strict scrutiny. *Tenaflly*, 309 F.3d at
5 172.

6 75. Here, the appropriate analysis is set forth in *Tenaflly*, not *Rosenbaum*.
7 Plaintiffs have adequately shown that the Regulations are enforced against their
8 conduct, but not similarly situated nonreligious conduct.

9 76. Second, even assuming the equal protection analysis in *Rosenbaum*
10 applied, this case is distinguishable from *Rosenbaum* in numerous ways. For
11 example:

- 12 a. There, the noise ordinance had been enforced against numerous
13 citizens in the past, both religious and nonreligious. Here, neither the
14 Delivery Rule nor the Stocking Rule has ever been enforced against
15 any pharmacy except Stormans’.
- 16 b. There, there had been complaints under the noise ordinance based on
17 a wide variety of religious and nonreligious speech.. Here, there has
18 never been a complaint under the Stocking Rule except with respect
19 to Plan B.
- 20 c. There, plaintiffs identified “only two incidents” where citizen
21 complaints may have been based on disagreement with the plaintiffs’
22 religious message. *Id.* at 1158. Here, Plaintiffs’ pharmacy faced a
23 boycott, picketing, and an organized campaign that filed dozens of
24 complaints based on opposition to Plaintiffs’ conscientious objections
25 to Plan B.

1 d. There, plaintiffs were allowed to continue to engage in their religious
2 conduct as long as they lowered the volume of their preaching. *Id.* at
3 1159. Here, Plaintiffs’ refusal to stock Plan B is completely
4 prohibited.

5 e. There, plaintiffs offered no evidence that the officials responding to
6 the complaints “knew about, agreed with or adopted any views of the
7 complainants.” *Id.* at 1159. Here, at least one Board member is on
8 record as stating that he disagrees with conscientious objections to
9 Plan B, and that he intends to prosecute conscientious objectors to
10 Plan B to the full extent of the law.

11 f. There, the ordinance included guidelines that limited the
12 government’s discretion in issuing permits. *Id.* at 1160-61. Here,
13 there are no guidelines governing the interpretation or enforcement
14 of the Stocking Rule, and the Board has complete discretion to enforce
15 it as it sees fit.

16 77. In short, plaintiffs in *Rosenbaum* failed to show that the government
17 enforced the noise ordinance against religious conduct, but ignored similarly
18 situated nonreligious conduct. Here, by contrast, the evidence shows that the
19 government has enforced the Regulations against Plaintiffs’ pharmacy—and only
20 against Plaintiffs’ pharmacy—while making no effort to enforce the Regulations
21 against widespread, widely known, nonreligious conduct that threatens access to
22 medication just as much as, or more than, Plaintiffs’ conduct. That is enough to
23 distinguish *Rosenbaum* and to establish selective enforcement under *Tenafly*.
24 Thus, the Regulations are not generally applicable.

E. Neutrality – Religious Gerrymandering

78. Next, the Court must consider whether the Regulations are neutral. At a minimum, a law is not neutral if it discriminates against religion on its face. *Lukumi*, 508 U.S. at 533. But “[f]acial neutrality is not determinative.” *Id.* at 534. Rather, the Free Exercise Clause also forbids “covert” hostility to religion and “subtle departures from neutrality.” *Id.* (quoting *Gillette v. United States*, 401 U.S. 437, 452 (1971)). Thus, the courts “must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.” *Id.*

79. In *Lukumi*, to determine whether the law accomplished a religious gerrymander, the Court examined three primary factors: (a) whether “the burden of the [law], in practical terms, falls on [religious objectors] but almost no others” (*id.* at 536); (b) whether “the interpretation given to the [law] by [the government]” favors secular conduct (*id.* at 537); and (c) whether the laws “proscribe more religious conduct than is necessary to achieve their stated ends” (*id.* at 538). The Court will examine each factor in turn.

1. The practical burden of the Regulations

80. The evidence at trial established that “the burden of the [Regulations], in practical terms, falls on [religious objectors] but almost no others.” *Id.* at 536. As noted above, there are a host of business, economic, and convenience reasons why pharmacies refer patients elsewhere. Table 1 lists over twenty-seven examples, all of which remain common to this day. But in practice, none of these secular referrals has been burdened by the Regulations. They are either exempt from the Regulations or tolerated by the Board in practice. In other words, the burden of the Regulations, “in practical terms,” does not fall on business objections; it falls on religious objections.

1 81. Relying on the “thin” preliminary injunction record, the Ninth Circuit
2 concluded that the burden of the Regulations also falls on “personal” objections.
3 *Stormans*, 586 F.3d at 1131. Similarly, throughout trial, the State emphasized
4 that the Regulations prohibit not just conscientious objections, but also “personal”
5 objections—such as when a pharmacist refuses to serve a patient because she
6 “shows up . . . wearing an Oregon Ducks hat.” [Nov 30 at 173]

7 82. At trial, however, Defendants were unable to adduce any evidence of
8 “personal” objections—aside from religious objections—that have actually served
9 as a basis for a pharmacy’s refusal to dispense a drug. Board witnesses testified
10 that they were not aware of any personal refusals to dispense a drug. Nor did the
11 rulemaking process produce such evidence. In short, the issue of “personal”
12 refusals is speculative.

13 83. The same is true of nonreligious “moral” objections to dispensing a
14 drug. *Stormans*, 586 F.3d at 1131. While one can imagine a pharmacist with a
15 nonreligious “moral” objection to dispensing a drug, Defendants offered no
16 evidence of any pharmacies or pharmacists that have such an objection, nor did
17 they offer any evidence that “moral” objections have ever served as a basis for
18 refusing to dispense a drug.

19 84. Even if defendants could identify a handful of real “personal” or
20 “moral” objections that were subject to the Regulations, that would not defeat a
21 claim of targeting under *Lukumi*. *Lukumi* found the ordinances non-neutral
22 because “*almost* the only conduct subject to [the ordinances] is the religious
23 exercise of Santeria.” 508 U.S. at 535 (emphasis added). The burden does not have
24 to fall *exclusively* on religious conduct; it is enough that “the burden of the
25 ordinance, in practical terms, falls on [religious] adherents but *almost* no others.”
26 *Id.* at 536 (emphasis added).

1 85. That is largely undisputed here. In contrast with hypothetical
2 “personal” objections, there is overwhelming evidence that the Regulations burden
3 real-world pharmacies and pharmacists with conscientious objections to Plan B.
4 Nearly all of the testimony before the Board dealt with conscientious objections to
5 Plan B. And the only real-world conduct that has ever been subject to the
6 Regulations is Plaintiffs’ conscientious objections to Plan B.

7 86. In short, “the burden of the [Regulations], in practical terms, falls on
8 [conscientious objectors] but almost no others.” 508 U.S. at 536. Defendants cannot
9 sanitize the Regulations by positing hypothetical secular conduct that might also
10 be prohibited under the Regulations—any more than the government in *Lukumi*
11 could sanitize its ordinances by positing hypothetical secular animal killings that
12 might have been prohibited under its ordinances.

13 **2. The interpretation of the Regulations**

14 87. Similar evidence shows that, as in *Lukumi*, “the interpretation given
15 to the [Regulations] by [the government]” favors secular conduct over religious
16 conduct. 508 U.S. at 537. As noted above, several open-ended provisions give the
17 Board broad discretion to interpret the Regulations on a case-by-case basis. For
18 example, the Board has discretion to punish conduct—or not—based on whether it
19 is “substantially similar” to other conduct, WAC 246-869-010(1), whether it is
20 undertaken in “good faith,” 246-869-010(1)(e), and whether it complies with the
21 open-ended Stocking Rule.

22 88. In practice, these provisions have never been interpreted to prohibit
23 widespread business, economic, and convenience reasons for referring patients
24 elsewhere. But they have been interpreted to prohibit Plaintiffs’ conscientious
25 objections to Plan B.

1 **3. The overbreadth of the Regulations**

2 89. Finally, as in *Lukumi*, the Regulations “proscribe more religious
3 conduct than is necessary to achieve their stated ends.” 508 U.S. at 538. That is,
4 they prohibit Plaintiffs’ religious conduct even when it poses no threat to timely
5 access to Plan B.

6 90. First, there is no evidence that Plaintiffs’ conscience-based referrals
7 have ever impeded timely access to Plan B. In fact, the government has stipulated
8 the opposite: “[R]eferrals help assure timely access to lawfully prescribed
9 medications . . . includ[ing] Plan B.”¹⁹³

10 91. Second, conscience-based referrals have been permitted in
11 Washington for decades, and the State has offered no evidence that they have
12 impeded timely access to medication. To the contrary, the State argues that it is
13 acting prophylactically—preventing a problem that has not yet arisen.. But that is
14 the essence of overbreadth.

15 92. Third, the Regulations are overbroad in light of the laws of other
16 states. As noted above, the vast majority of states *do not* obligate pharmacies to
17 stock and dispense Plan B; rather, they permit facilitated referral. These states
18 have no less interest in ensuring timely access to medication than does
19 Washington; yet they achieve their interest without forcing pharmacies and
20 pharmacists to violate their consciences.

21 93. Fourth, the Regulations are overbroad in light of the available
22 alternatives. The State claims that, as an alternative to referral, pharmacies can
23 accommodate the conscience of their employees by hiring a second pharmacist,
24 applying for Board approval of a telepharmacy program or using an on-call
25 pharmacist or hiring a second full-time pharmacist. But in many (if not most)

26

¹⁹³ Dkt #441, ¶ 1.5.

1 cases, the first two options are prohibitively expensive and, in the case of
2 telepharmacy, it is a speculative option given the Board has never and would like
3 never approve a telepharmacy application for the purpose of covering for an
4 absent pharmacist when another nearby pharmacy can provide a clinically
5 superior, in-person consultation with a pharmacist. As to the on-call pharmacist,
6 it is more timely to refer a patient to a nearby pharmacy than to wait for an on-call
7 pharmacist to arrive. Banning conscience-based referrals thus *slows* access to
8 medication.

9 94. Finally, if the Stormans are forced to stock and deliver Plan B in
10 violation of conscience, it is undisputed that they will be forced to close their
11 pharmacy. Similarly, if individual pharmacists like Ms. Mesler and Ms. Thelen
12 cannot be accommodated, they will be forced to find a different job, leave the state,
13 or leave the profession. Shutting down pharmacies and driving conscientious
14 pharmacists from the profession does not enhance timely access to medication; it
15 undermines it. This is further evidence of the Regulations' overbreadth.

16 95. In sum, because the burden of the Regulations falls almost
17 exclusively on conscientious objectors, because the Regulations have been
18 interpreted to disfavor conscientious objections, and because the Regulations
19 prohibit conscientious objections even when they do not threaten access to
20 medication, the Regulations are not neutral under *Lukumi*.

21 96. This conclusion is not based merely on the fact that "pharmacists
22 with religious objections to Plan B will disproportionately require accommodation
23 under the rules." *Stormans*, 586 F.3d at 1131. Rather, it is based on the conclusion
24 that the "design of these [Regulations] accomplishes instead a 'religious
25 gerrymander[.]'" *Lukumi*, 508 U.S. at 535 (quoting *Walz v. Tax Comm'n*, 397 U.S.
26 at 696).

1 **F. Neutrality – Discriminatory Intent**

2 97. A law also fails the neutrality requirement if it was enacted with
3 discriminatory intent—in other words, if the law was “enacted ‘because of,’ not
4 merely ‘in spite of,’ [its] suppression of” religious conduct. *Lukumi*, 508 U.S. at
5 540. As the Ninth Circuit pointed out, “the law is unsettled” on how a plaintiff can
6 attempt to prove discriminatory intent—and in particular, whether a plaintiff may
7 offer evidence of the “historical background” of the regulations and their
8 “legislative history.” *Stormans*, 586 F.3d at 1131-32.

9 98. In *Lukumi*, two justices (Justices Kennedy and Stevens) joined Part
10 II.A.2 of the opinion, which examined “both direct and circumstantial evidence” of
11 the law’s intent. 508 U.S. at 540. According to these justices, “[r]elevant evidence
12 includes, among other things, the historical background of the decision under
13 challenge, the specific series of events leading to the enactment or official policy in
14 question, and the legislative or administrative history, including contemporaneous
15 statements made by members of the decision-making body.” *Id.* Two justices (Chief
16 Justice Rehnquist and Justice Scalia) disagreed with that approach. *Id.* at 558-59.
17 Five justices expressed no opinion.

18 99. This Court is of the opinion that cautiously considering the historical
19 background of a law is the best approach, for several reasons. First, the Ninth
20 Circuit, in dictum, has suggested that the use of equal protection jurisprudence in
21 the free exercise context is appropriate, citing the portion of *Lukumi* that relied on
22 legislative history. *See San Jose Christian College v. City of Morgan Hill*, 360 F.3d
23 1024, 1030 n.4 (9th Cir. 2004) (“The Supreme Court has approved reference to
24 equal protection jurisprudence.”).

25 100. Second, every other circuit to address the issue has considered
26 historical background to be relevant in free exercise challenges. *See, e.g., St. John’s*

1 *United Church of Christ v. City of Chicago*, 502 F.3d 616, 633 (7th Cir. 2007) (court
2 must examine “the ‘historical background of the decision under challenge, the
3 specific series of events leading to the enactment . . . and the [act’s] legislative or
4 administrative history”) (quoting *Lukumi*); *Prater v. City of Burnside*, 289 F.3d
5 417, 429-30 (6th Cir. 2002) (relying on historical allegations and legislative
6 history); *CHILD, Inc. v. Min De Parle*, 212 F.3d 1084, 1090 (8th Cir. 2000) (“the
7 law’s legislative history” is relevant); *Wirzburger v. Galvin*, 412 F.3d 271, 281-82
8 (1st Cir. 2005) (considering, on free exercise challenge, “evidence of animus against
9 Catholics in Massachusetts in 1855 when the [law] was passed,” “the wide margin
10 by which the [law] passed,” and the convention’s “significant Catholic
11 representation”). No circuit has ruled historical background off limits.

12 101. Third, both the Supreme Court and the Ninth Circuit routinely
13 consider the historical background of a law when assessing the law’s purpose
14 under the Establishment Clause—which requires that all laws have a secular
15 purpose. Relevant evidence includes the “contemporaneous legislative history
16 [and] the historical context of the statute, . . . and the specific sequence of events
17 leading to [its] passage.” *Edwards v. Aguillard*, 482 U.S. 578, 594-95 (1987); *see*
18 *also Cammack v. Waihee*, 932 F.2d 765, 774 (9th Cir. 1991) (“In determining the
19 legislative purpose, courts may consider the statute on its face, its legislative
20 history, or . . . the historical context of the statute and the specific sequence of
21 events leading to the passage of the statute.”). It would make little sense to allow
22 courts to consider a law’s historical background under the Establishment Clause,
23 but forbid courts to consider the same evidence under the Free Exercise Clause.¹⁹⁴

24 _____
25 ¹⁹⁴ Courts also consider a law’s historical background under the Equal Protection Clause and the
26 Free Speech Clause. *See, e.g., Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 489 (1997)
27 (“[C]onsiderations relevant to the purpose inquiry [under the Equal Protection Clause] include ...
the historical background of the [jurisdiction’s] decision; [t]he specific sequence of events leading up
to the challenged decision[;] ... and [t]he legislative or administrative history.”); *NEA v. Finley*, 524

1 102. In short, *Lukumi* requires this Court to determine whether a law was
2 enacted with discriminatory “purpose.” 508 U.S. at 533. And courts routinely
3 determine a law’s purpose based at least in part on the law’s historical
4 background. Accordingly, this Court will carefully consider the historical
5 background of the Regulations, taking into account the inherent limitations in
6 legislative history.

7 103. At the preliminary injunction stage, the Ninth Circuit concluded that
8 the history of the Regulations “provides no meaningful guidance on the object or
9 neutrality of the final rules adopted by the Board,” because that history revealed
10 “a patchwork quilt of concerns, ideas, and motivations.” *Stormans*, 586 F.3d at
11 1133. However, four years of discovery and twelve days of trial have revealed
12 voluminous evidence that was unavailable at the preliminary injunction stage.
13 Thus, this Court will consider the evidence anew.

14 104. In *Lukumi*, the portion of the opinion addressing discriminatory
15 intent focused on three types of evidence. First, the Court relied on “the events
16 preceding [the ordinances’] enactment”—in particular, the fact that “the city
17 council made no attempt to address the supposed problem” until “just weeks after
18 the Church announced plans to open.” *Id.* at 540-41. Second, the Court relied on
19 “statements by members of the city council” expressing opposition to Santeria. *Id.*
20 at 541. Third, the Court relied on “hostility exhibited by residents” during the
21 legislative process, and comments by unrelated city officials (such as a police
22 chaplain, a city attorney, and a deputy city attorney). *Id.* at 541-42. Taken
23 together, the events and comments showed that the purpose of the ordinances was
24 to target Santeria sacrifice. *Id.* at 542.

25
26 U.S. 569, 581 (1998) (determining whether a law was viewpoint discriminatory based in part on
27 “the political context surrounding the adoption of the [law]”).

PLAINTIFFS’ PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW - 99
(C07-5374)

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1 105. Here, a much larger body of evidence adduced at trial shows that the
2 purpose of the Regulations was to target conscientious objections to Plan B.
3 Although some of the Board members, the Governor, and the “stakeholders” were
4 careful not to make obviously inflammatory comments like the city officials in
5 *Lukumi*, the record of their correspondence and actions demonstrates that there
6 were no “personal” objections, and the primary purpose of the Regulations was to
7 prohibit conscientious objections to Plan B.

8 106. First, as detailed in the Findings of Fact above, the focus of the
9 regulatory process, from beginning to end, was on conscientious objections to Plan
10 B:

- 11 a. Before the regulatory process began, prominent events focused the
12 Board’s attention specifically on conscientious objections to Plan B—
13 not any other objections or any other drug.
- 14 b. Public comments during the rulemaking process focused
15 overwhelmingly on conscientious objections to Plan B.
- 16 c. The Governor and her advocates, in internal discussions and when
17 pressuring the Board, focused overwhelmingly on conscientious
18 objections to Plan B.
- 19 d. Internal Department of Health and Board staff discussions over the
20 draft rules focused on conscientious objections to Plan B.
- 21 e. After the Regulations were finalized, the Board’s October 2006 survey
22 on access dealt almost exclusively with conscientious objections to
23 Plan B.
- 24 f. The Regulations, in practice, have been enforced only against
25 conscientious objections to Plan B.

1 107. Second, additional evidence at trial demonstrated that, unlike most of
2 the Board's regulations, these Regulations were not the product of a neutral,
3 bureaucratic process based solely on pharmaceutical expertise. Rather, they were
4 a highly political affair, driven largely by the Governor and Planned Parenthood—
5 both outspoken opponents of conscientious objections to Plan B:

- 6 a. In accordance with both the National and State Pharmacy
7 Association, the Board originally voted in favor of accommodating
8 conscientious objections.
- 9 b. Within hours of the Board's pro-conscience vote, the Governor and
10 Planned Parenthood set in motion a plan to reverse the Board's
11 decision. The Governor publicly threatened to replace members of the
12 Board, and the Governor, based on the unprecedented participation of
13 Planned Parenthood and other pro-choice advocates in the Board
14 interview process, did, in fact, refuse to reappoint Board Chair Awan.
- 15 c. The Governor's own handwritten notes indicate her primary concern
16 was ensuring the Regulations were "clean enough for the advocates
17 [*i.e.*, Planned Parenthood] re: conscious/moral issues."
- 18 d. The Governor ultimately advocated a draft regulation that prohibited
19 conscience-based referrals.
- 20 e. To ensure her victory, the Governor personally called the Board Chair
21 to pressure him to do pass her Regulations, after she had advised her
22 staff that calling Board members was unlawful.
- 23 f. When the Chair resisted, the Governor replaced him with appointees
24 recommended by Planned Parenthood.
- 25 g. Neither the Board nor the Governor ever researched access to Plan
26 B (or any other drug) before passing the Regulations. The Board
27

1 never identified a single incident in which a patient was unable to
2 gain timely access to Plan B. And its post hoc survey of access to Plan
3 B showed that there was no problem of access.

4 108. Third, the record of the stakeholder meetings, which ultimately
5 produced the text of the Regulations, shows that the purpose of the Regulations
6 was to protect referrals for business reasons while prohibiting referrals for reasons
7 of conscience:

8 109. Finally, the 2010 rulemaking process further confirmed that the
9 primary goal of the process was to ensure that pharmacies retained broad
10 discretion to refer patients elsewhere for business reasons, but not for reasons of
11 conscience.

12 110. In sum, the record consists of abundant evidence that the regulatory
13 process was initiated in response to conscientious objections to Plan B; that the
14 process focused almost exclusively on conscientious objections to Plan B; that the
15 process was driven by powerful political opposition to conscientious objections to
16 Plan B; that the Board never identified any problem of access to Plan B; and that
17 the only result of the Regulations has been to prohibit conscientious objections to
18 Plan B. In short, the Regulations were adopted “because of” conscientious
19 objections to Plan B, not merely “in spite of” them. *Lukumi*, 508 U.S. at 540.

20 **G. Neutrality – Differential Treatment of Two Religions**

21 111. A law can also fail the neutrality requirement when it produces
22 “differential treatment of two religions.” *Lukumi*, 508 U.S. at 536. As the Supreme
23 Court has repeatedly said, the “clearest command” of the religion clauses is that
24 “one religious denomination cannot be officially preferred over another.” *Larson v.*
25 *Valente*, 456 U.S. 228, 244 (1982).

1 112. In *Lukumi*, for example, the ordinances prohibited Santeria sacrifice,
2 but included an exemption for kosher slaughter. 508 U.S. at 536. The Supreme
3 Court suggested that this “differential treatment of two religions” might be “an
4 independent constitutional violation.” *Id.* Similarly, in *Larson v. Valente*, 456 U.S.
5 228, 230 (1982), the Supreme Court struck down a state law that imposed
6 registration and reporting requirements upon only those religious organizations
7 that solicited more than fifty per cent of their funds from nonmembers. According
8 to the Court, these requirements impermissibly distinguished between “well-
9 established churches,” which had strong support from their members, and
10 “churches which are new and lacking in a constituency,” which had to rely on
11 solicitation from nonmembers. *Id.* at 246 n.23.

12 113. Here, the evidence at trial revealed two different types of “differential
13 treatment” among religions. First, as noted above, the Death With Dignity Act
14 categorically exempts pharmacists who have a conscientious objection to
15 participating in assisted suicide. Thus, one religious belief is protected
16 (conscientious objections to assisted suicide), but another is forbidden
17 (conscientious objections to Plan B). Several Board witnesses supported this result
18 simply because they personally disagree with Plaintiffs about when life begins.

19 114. Second, the evidence at trial revealed that Roman Catholic
20 institutions operate numerous hospitals in Washington, which include outpatient
21 pharmacies serving the general public. These pharmacies, like Ralph’s, refuse to
22 stock or dispense Plan B or *ella*. Thus, like Ralph’s, Catholic pharmacies are
23 operating in “outright defiance” of the Stocking Rule.

24 115. The evidence at trial also revealed that the Board is aware of the
25 practices of Catholic pharmacies, but has made no effort to enforce the Regulations
26 against them.

1 116. Board witnesses were unable to provide a reasoned explanation for
2 why it would enforce the Regulations against Plaintiffs' small, independent
3 pharmacy, but would ignore known violations of the same Regulations by Catholic
4 pharmacies. Some witnesses had no explanation. Others stated that the Board
5 would not enforce the Regulations until it received a complaint.

6 117. The more plausible explanation is that the Board does not object to
7 shutting down a small, independent pharmacy like Ralph's, which was the object
8 of a boycott honored by the Governor and was picketed and demonized by the local
9 media. But the Board recognizes that shutting down Catholic pharmacies would
10 have a devastating impact on access to health care. Thus, in practice, the
11 Regulations are enforced against small, independent conscientious objectors
12 "lacking in a constituency," but not against "well-established churches" that are a
13 pillar of health care within the state. *Larson*, 456 U.S. at 246 n.23. That
14 constitutes "differential treatment of two religions," rendering the Regulations
15 non-neutral under *Lukumi*. 508 U.S. at 536.

16 **H. Hybrid Rights**

17 118. Because this Court finds that the Regulations are not neutral or
18 generally applicable, it need not consider Plaintiffs argument that the Regulations
19 are subject to strict scrutiny because they involve "hybrid rights."

20 **I. Strict Scrutiny**

21 119. Because the Regulations are not neutral or generally applicable, they
22 are subject to strict scrutiny. This requires Defendants to show that the
23 Regulations (1) "advance interests of the highest order" and (2) are "narrowly
24 tailored in pursuit of those interests." *Lukumi*, 508 U.S. at 546 (quotations
25 omitted). This is "the most demanding test known to constitutional law." *City of*
26 *Boerne v. Flores*, 521 U.S. 507, 534 (1997). It requires the courts to "look[] beyond
27

1 broadly formulated interests justifying [the law]” and instead “scrutinize[] the
2 asserted harm of granting *specific* exemptions to *particular* religious claimants.”
3 *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431
4 (2006) (emphasis added). For several reasons, Defendants have not satisfied this
5 test.

6 **1. Over-Inclusivity**

7 120. First, the Regulations are not narrowly tailored because they are
8 “overbroad,” prohibiting significantly more religious conduct than necessary to
9 achieve the government’s stated end. *Lukumi*, 508 U.S. at 546. Here, the stated
10 end is timely access to medication; but by the government’s own stipulation,
11 Plaintiffs’ conscientious objections to Plan B do not undermine that interest.

12 121. The government has stipulated that “referral is a time-honored
13 pharmacy practice, it continues to occur for many reasons, and is often the most
14 effective means to meet the patient’s request.”¹⁹⁵. With respect to Plaintiffs’
15 conduct, the government further stipulated that “facilitated referrals *do not pose a*
16 *threat to timely access to lawfully prescribed medications[,] . . . includ[ing] Plan B.*”
17 *Id.* ¶ 1.6 (emphasis added). In other words, Defendants *agree* that Plaintiffs’
18 conduct does not threaten timely access to Plan B. Thus, as applied to Plaintiffs’
19 conduct, the Regulations are “overbroad”—not narrowly tailored. *Lukumi*, 508
20 U.S. at 546.

21 122. Even aside from the stipulations, the evidence at trial has shown that
22 Plaintiffs’ conduct does not pose a threat to timely access to medication. First,
23 Defendants have not identified any problem of access to Plan B. Indeed, all
24 evidence is to the contrary. Plan B is available without a prescription to anyone
25 over age sixteen, and it is widely available at pharmacies, doctors’ offices,

26 ¹⁹⁵ Dkt. #441, ¶ 1.5

1 government health centers, emergency rooms, Planned Parenthood, and a toll-free
2 hotline. It is also available for overnight delivery via the Internet. According to the
3 Board's own survey, there is no problem of access to Plan B. And throughout the
4 rulemaking process, Defendants were unable to identify any significant problem of
5 timely access to Plan B.

6 123. More importantly, strict scrutiny focuses on whether the law furthers
7 the government's interest *as applied to the particular Plaintiffs*. See *O Centro*, 546
8 U.S. at 431 (Government must show with "particularity" that its interest "would
9 be adversely affected by granting an exemption.") (quoting *Wisconsin v. Yoder*, 406
10 U.S. 205, 236 (1972)); Here, it is undisputed that Plaintiffs' practices pose no
11 access problem. Plaintiffs can and do refer patients to dozens of nearby
12 pharmacies that willingly stock and dispense Plan B. Plaintiffs regularly refer
13 patients to those nearby locations for any number of drugs, and there is no
14 evidence that Plaintiffs' practices have ever denied a patient timely access to Plan
15 B.

16 2. Under-Inclusivity

17 124. The Regulations also fail strict scrutiny because they are
18 "underinclusive in substantial respects"—*i.e.*, "[t]he proffered objectives are not
19 pursued with respect to analogous non-religious conduct." *Lukumi*, 508 U.S. at
20 546. Although the government asserts, in the case of Plaintiffs, that it has an
21 interest in promoting immediate, on-site delivery of time-sensitive medication, it
22 permits pharmacies to undermine that alleged interest for a wide variety of
23 business, convenience, and personal reasons. For example, pharmacies can refuse
24 to stock Plan B if it does not fall within their business niche; they can refuse to
25 stock time-sensitive insulin medication because they want extra shelf space; and
26

1 they can refuse to accept payment for Plan B if they do not want the hassle of
2 dealing with the patient's insurance plan.

3 125. Beyond that, the obligation to stock a drug does not commence unless
4 a regular patient demands it (if ever), meaning that travelers or those who visit a
5 pharmacy for the first time can be denied medication. And the State allows doctors
6 to refuse to write prescriptions for Plan B, thus preventing patients who are under
7 the age of seventeen from accessing the drug. All of these actions, and many more,
8 prevent immediate, on-site delivery of time-sensitive medication. Thus, "[t]he
9 proffered objectives are not pursued with respect to analogous non-religious
10 conduct," and the Regulations are not narrowly tailored. *Lukumi*, 508 U.S. at 546.

11 126. The broad exemptions for secular conduct also prevent the
12 government from demonstrating that the Regulations further a compelling
13 interest. As the Court explained in *Lukumi*: "[A] law cannot be regarded as
14 protecting an interest 'of the highest order' when it leaves appreciable damage to
15 that supposedly vital interest unprohibited." 508 U.S. at 547 (alteration omitted).
16 Just as permitting a wide variety of secular killing undermined the alleged
17 governmental interest in *Lukumi*, permitting a wide variety of secular refusals to
18 stock or deliver drugs undermines the alleged interest here. Moreover, the
19 government has failed to adduce any evidence, either before or after passing the
20 Regulations, of a problem of access to Plan B or any other drug. Thus, the
21 government has failed to demonstrate that the Regulations further a compelling
22 governmental interest.

23 3. Undermining the Interest

24 127. Finally, the Regulations are not narrowly tailored because, as applied
25 to Plaintiffs, they actually *undermine* the government's alleged interest. As noted
26 above, if the owners of Ralph's are forced to stock and deliver Plan B in violation of

1 conscience, they will be forced to shut down. And if pharmacies are forbidden from
2 accommodating pharmacists like Ms. Thelen and Ms. Mesler, such pharmacists
3 will be driven from the profession. Shutting down pharmacies and reducing the
4 number of practicing pharmacists will not increase access for anyone. Thus,
5 applying the Regulations here ultimately reduces, rather than increases, access to
6 drugs.

7 **J. Rational Basis**

8 128. Because the Regulations are not neutral or generally applicable, they
9 are subject to strict scrutiny. This Court need not assess whether the Regulations
10 satisfy rational basis review.

11 **III. Supremacy Clause**

12 129. Under the Supremacy Clause of Article VI of the U.S. Constitution,
13 federal law preempts state law in three scenarios: (1) an express statement of
14 preemption, (2) occupation of the field, or (3) conflict between state and federal
15 law. *Malabed v. No. Slope Borough*, 335 F.3d 864, 869 (9th Cir. 2003); *Cipollone v.*
16 *Liggett Group, Inc.*, 505 U.S. 504 (1992). Here, the Regulations are preempted
17 under the first and third scenarios because they prohibit employers from
18 accommodating the religious beliefs of their employees.

19 130. The first basis for preemption is Title VII's express statement of
20 preemption. Title VII provides that it preempts "any provision of State law" that is
21 "inconsistent with any of the purposes of this Act, or any provision thereof." 42
22 U.S.C. § 2000h-4. Similarly, 42 U.S.C. § 2000e-7 provides an exemption from any
23 state law that "require[s] or permit[s] the doing of any act which would be an
24 unlawful employment practice" under Title VII. In light of these provisions, any
25 state law that requires or permits a violation of Title VII is preempted. *Malabed*,

1 335 F.3d at 870, 871; *see also Sosa v. Hiraoka*, 920 F.2d 1451 (9th Cir. 1990);
2 *Rosenfeld v. So. Pac. Co.*, 444 F.2d 1219 (9th Cir. 1971).

3 131. Here, the Regulations are preempted because they permit, and in
4 many cases require, a violation of Title VII. Specifically, Title VII requires
5 employers to make reasonable accommodations for their employee's religious
6 beliefs. 42 U.S.C. § 200e(j); *American Postal Workers Union v. Postmaster Gen.*,
7 781 F.2d 772, 776 (9th Cir. 1986). Prior to the Regulations, pharmacies routinely
8 complied with Title VII by allowing pharmacists with conscientious objections to
9 refer patients to a nearby pharmacy for timely access to Plan B. But the
10 Regulations make this form of accommodation illegal. Thus, they directly conflict
11 with Title VII.

12 132. The second basis for preemption is the conflict between the
13 Regulations and Title VII. Conflicts occur when the state law makes "compliance
14 with both federal and state regulations a physical impossibility" and when it
15 "stands as an obstacle to the accomplishment and execution of the full purposes
16 and objectives of Congress." *Cal. Fed. Savings & Loan Assoc. v. Guerra*, 479 U.S.
17 272, 281 (1987) (citations omitted)). Congress passed Title VII "to prohibit all
18 practices in whatever form which create inequality in employment due to
19 discrimination on the basis of race, religion, sex, or national origin, and ordained
20 that its policy of outlawing such discrimination should have the 'highest priority.'
21 *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976) (citations omitted).

22 133. Here, the Regulations prevent a pharmacy from offering reasonable
23 accommodations to conscientious objectors, making compliance with Title VII and
24 the Regulations in many cases impossible. This conflict overcomes any
25 presumption asserted by Defendants that the Regulations are valid.

1 **IV. Fourteenth Amendment**

2 134. The Due Process Clause “provides heightened protection against
3 government interference with certain fundamental rights and liberty interests.”
4 *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). To receive protection
5 under the Due Process Clause, a right must be, “objectively, ‘deeply rooted in this
6 Nation’s history and tradition, . . . and ‘implicit in the concept of ordered liberty’
7 such that ‘neither liberty nor justice would exist if [it was] sacrificed.’” *Id.* (quoting
8 *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) and *Palko v. Connecticut*, 302
9 U.S. 319 (1937)). It must also be subject to a “careful description” of the asserted
10 fundamental liberty interest at stake. *Id.* at 721 (citing *Reno v. Flores*, 507 U.S.
11 292, 302 (1993)).

12 135. When analyzing a due process claim, the “crucial guideposts for
13 responsible decisionmaking” are the nation’s “history, legal traditions, and
14 practices.” *Id.* (internal quotations and citations omitted). The question is whether
15 the right is “so rooted in the traditions and conscience of our people as to be
16 ranked as fundamental.” *Snyder v. Commonwealth*, 291 U.S. 97, 105 (1934). If so,
17 the right may not be infringed “*at all*, no matter what process is provided, unless
18 the infringement is narrowly tailored to serve a compelling state interest.”
19 *Glucksberg*, 521 U.S. at 721. (quoting *Flores*, 507 U.S. at 302).

20 136. Here, the fundamental liberty interest at stake is the right to refrain
21 from taking human life. This right is deeply rooted in our nation’s “history, legal
22 traditions, and practices.” *Id.* It was first protected in the colonial era in the
23 context of compulsory military service. It has also been consistently protected for
24 health care practitioners in the context of abortion, abortifacient drugs, assisted
25 suicide, and capital punishment. It is widely recognized in the U.S. medical
26 community, and it is recognized in foreign and international law. *See generally*

1 Mark Rienzi, *The Constitutional Right to Refuse: Roe, Casey, and the Fourteenth*
2 *Amendment Rights of Healthcare Providers*, forthcoming 87 Notre Dame L. Rev __
3 (2011).¹⁹⁶

4 137. The Regulations violate Plaintiffs right to refrain from taking human
5 life. Plaintiffs believe, as a matter of sincere religious faith, that human life begins
6 at conception, and that participating in the destruction of a fertilized egg by
7 dispensing Plan B or *ella* takes human life. The Regulations force Plaintiffs to
8 choose between participating in taking human life or losing their pharmacy
9 licenses and their livelihoods. That is more than enough to require strict scrutiny
10 under the Due Process Clause. *Glucksberg*, 521 U.S. at 721. As explained above,
11 the Regulations cannot satisfy strict scrutiny.

12 **V. Permanent Injunction**

13 138. Because the Regulations violate the Constitution, they should be
14 permanently enjoined so that the government cannot enforce them against
15 Plaintiffs. This Court has broad discretion to fashion appropriate equitable relief.
16 *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). A permanent
17 injunction is appropriate when the plaintiff demonstrates:

18 (1) that it has suffered an irreparable injury; (2) that remedies
19 available at law, such as monetary damages, are inadequate to
20 compensate for that injury; (3) that, considering the balance of
21 hardships between the plaintiff and defendant, a remedy in equity is
warranted; and (4) that the public interest would not be disserved by
a permanent injunction.

22 *Antoninetti v. Chipotle Mexican Grill, Inc.*, 643 F.3d 1165, 1174 (9th Cir.
23 2010) (quoting *eBay*, 547 U.S. at 391).

24 139. Here, all four factors favor a permanent injunction.

26 ¹⁹⁶ Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1749788.

1 140. *Irreparable Injury*. First, Plaintiffs have suffered an irreparable
2 injury because the Regulations deprive them of their right to the free exercise of
3 religion under the First Amendment. Both the Ninth Circuit and the Supreme
4 Court “have repeatedly held that ‘[t]he loss of First Amendment freedoms, for even
5 minimal periods of time, unquestionably constitutes irreparable injury.’” *Klein v.*
6 *City of San Clemente*, 584 F.3d 1196, 1207-08 (9th Cir. 2009) (quoting *Elrod v.*
7 *Burns*, 427 U.S. 347, 373 (1976)). As the Ninth Circuit stated in its preliminary-
8 injunction ruling: “If [Plaintiffs] are compelled to stock and distribute Plan B . . . ,
9 and a trial on the merits shows that such compulsion violates their constitutional
10 rights, [Plaintiffs] will have suffered irreparable injury, since unlike monetary
11 injuries, constitutional violations cannot be adequately remedied through
12 damages.” *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1138 (9th Cir. 2009)
13 (emphasis added; internal quotations omitted). Beyond the loss of First
14 Amendment freedoms, Plaintiffs face severe emotional harms if they are forced to
15 choose between following their religious beliefs, which forbid them from
16 participating in the destruction of human life, and continuing to provide for their
17 families. *See American Trucking Associations, Inc. v. City of Los Angeles*, 559 F.3d
18 1046, 1059 (9th Cir. 2009) (“[T]he loss of one’s [business] does not carry merely
19 monetary consequences; it carries emotional damages and stress, which cannot be
20 compensated by mere back payment of [losses].”) (alterations in original; internal
21 quotations omitted).

22 141. *Inadequate Remedy at Law*. For similar reasons, Plaintiffs have no
23 adequate remedy at law—“since unlike monetary injuries, constitutional violations
24 cannot be adequately remedied through damages.” *Id.* (emphasis added; internal
25 quotations omitted). Beyond emotional harms and the loss of First Amendment
26 rights, Plaintiffs also face the loss of their job, their business, and their livelihood.

1 Although such financial losses might ordinarily be remedied through damages,
2 “the Eleventh Amendment sovereign immunity of the [State Defendant] bars the
3 [Plaintiffs] from ever recovering damages in federal court.” *California Pharmacists*
4 *Ass’n v. Maxwell-Jolly*, 563 F.3d 847, 851-52 (9th Cir. 2009). Thus, an injunction is
5 particularly appropriate because Plaintiffs have *no remedy* available at law. *Id.*

6 142. *Balance of Hardships.* The balance of hardships also tips
7 overwhelmingly in Plaintiffs favor. Absent an injunction, Plaintiffs will be forced
8 to choose between their First Amendment rights and their ability to provide for
9 their families. Such a “stark choice” tips “sharply” in favor of granting an
10 injunction. *Nelson v. National Aeronautics and Space Admin.*, 530 F.3d 865, 881-82
11 (9th Cir. 2008), *rev’d on other grounds*, *National Aeronautics and Space Admin. v.*
12 *Nelson*, 131 S.Ct. 746 (2011). On the other side of the scale, Defendants offer *no*
13 *evidence* of hardship. There is no evidence that Plaintiffs’ referrals have ever
14 impeded timely access to Plan B. In fact, Defendants have stipulated precisely the
15 opposite: “that facilitated referrals help assure timely access to lawfully prescribed
16 medications . . . includ[ing] Plan B.”¹⁹⁷.

17 143. *Public Interest.* For the same reasons, the public interest weighs
18 heavily in favor of a permanent injunction. The Ninth Circuit has recognized a
19 “significant public interest” in upholding First Amendment principles. *Klein*, 584
20 F.3d at 1208. Here, the Regulations infringe “not only the [First Amendment]
21 interest of [Plaintiffs], but also the interests of other people subjected to the same
22 restrictions.” *Id.* (internal quotations omitted). On the other hand, enforcing the
23 Regulations against Plaintiffs serves no public interest, as Plaintiffs’ conduct
24 undisputedly does not threaten any alleged interest in timely access to medication.

25
26 ¹⁹⁷ Dkt. #441, ¶ 1.5

1 **JUDGMENT**

2 144. As prevailing parties, Plaintiffs are entitled to their reasonable
3 attorneys' fees and costs pursuant to 42 U.S.C. §§1983, 1988.

4 145. The Court has entered a Judgment enjoining the Regulations as
5 applied to Plaintiffs in a separate order.

6
7 Done in open court this __ day of _____, 2012

8
9 _____
United States District Judge
Ronald B. Leighton

10 Respectfully submitted this 10th day of November, 2012.
11

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27 PLAINTIFFS' PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW - 114
(C07-5374)

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2012, I electronically filed the foregoing Plaintiffs' Proposed Findings of Fact and Conclusions of Law with the Clerk of the Court using the CM/ECF System, which will send notification of the filing to all counsel of record.

I certify under penalty of perjury that the foregoing is true and correct.

DATED this 10th day of November, 2012.

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